Supreme Cou
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10-799 DEC 14 2010

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

Duane W. Larson,
Pamela A. Larson
Petitioners,

v.

United States of America,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Duane W. Larson; JD – *Pro Se*
23580 Carneros Court
Murrieta, Ca. 92562
951-813-3190
Dwlarson48@yahoo.com

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QUESTIONS PRESENTED FOR REVIEW:

QUESTION I. In this tax refund case has *Larson v. U.S., No. 2010-5020 (Fed. Cir. decided 5-20-201)* entered a decision in conflict with *U.S. v. Clintwood Elkhorn Mining Co.*, Case No. 07-308 (U.S. S. Ct., decided 4-15-2008), and 26 USC 7422(d), because it upheld res judicata from U.S. District Courts that had no subject matter jurisdiction because: the tax was not paid in full when the complaint was filed as required by 26 USC 6511(a), and the action was dismissed without a final judgment on the merits; and because there were no timely refund requests filed with the IRS as required by 26 USC 6511 and 26 USC 7422(a); and per *Clintwood* those courts therefore lacked subject matter jurisdiction and therefore they were not courts of competent jurisdiction where per *Montana v. U.S., 440 U.S. 147, 153-4 (1979)* only a court of competent jurisdiction can determine a right, question, fact, claim, or issue if that determination is to have res judicata effect?

QUESTION II. Has the Federal Circuit below entered a decision in conflict with *Montana v. U.S., 440 U.S. 147, 153-154 (1979)* when it upheld there was res judicata from the Tax Court where the Tax Court determined only Larsons' tax liabilities, and where the Tax Court's decision is not in dispute, but rather the complaint filed in the U.S. Court of Federal Claims by Larsons sought the refund of taxes assessed and collected in excess of the Tax Court's order, where timely refund requests had been filed with the IRS, and were legally amended, and the complaint was brought **after** the Tax Court's order had become final, and where it presented entirely different questions of fact, claims, issues, legal questions, and rights than those put in issue and actually and necessarily litigated and determined in the Tax Court, and which by their very nature could not have been raised in the Tax Court before the Tax Court issued its order, and **because by statute** refund request claims require the taxes first to be paid in full, and a **final Tax Court order** to first be in place before any court, including the Tax Court, can have subject matter jurisdiction to determine a refund request seeking the excess collection of a **final Tax Court** order per 26 USC 6213(a), 26 USC 6512(a)(2) & (5), and 26 USC 6861(f), and where the Tax Court's determination dated 6-30-94 determined the amount owed to be $485,834.83, as already assessed by the Notice of Deficiency dated 9-16-85, but it did not allow the IRS to assess an additional $191,319.30 on 11-23-94?

QUESTION III. Has the Federal Circuit below entered a decision in conflict with its own *Computervision Corp. v. U.S., 445 F.3d 1355 (Fed. Cir. 2008)* where the Federal Circuit upheld the Court of Federal Claims' holding that the amendments to the refund requests "were not germane" where *Computervision Sec. II)* states germaness is **only** required for **formal IRS Form 1040X** refund requests which are later amended by a second formal IRS Form 1040X, but where the applicable refund requests here that provided the Court of Federal Claims with subject matter jurisdiction were informal refund requests which were later legally amended in 2006 & 2007 and per *Computervision Sec. IA* germaness is **NOT** required for amended **informal** refund requests?

QUESTION IV. Has the Federal Circuit below erred as a matter of law per 26 USC 6213(a) and 26 USC 6861(f) when it failed to note that the assessments of 11-23-94 were invalid because they were assessed per 26 USC 6861(a) before the Tax Court order was final, and where in fact the assessments of 11-23-94 were **double assessments** that had already been assessed by the Notice of Deficiency jeopardy assessment dated 9-16-85, and were already **paid in full** as of 9-12-90, and therefore the collections that resulted from the 11-23-94 assessments were collections made in excess of the Tax Court order, which can be refunded per both 26 USC 6512(a)(2) & (5), but per 26 USC 6861(f) the excess collections **must be refunded per se and "without the filing of a claim therefor"**?

Question V. ***As a matter of first impression*** for the U.S. Supreme Court, where Larson provided subject matter jurisdiction for the Court of Federal Claims per 26 USC 7422(a) and 26 USC 6511 and through legally amended informal refund requests as amended in 2006 & 2007, and where the facts show the double assessments dated 11-23-94, assessed per 26 USC 6861, resulted in over collections of some $515,987.24 in excess of the Notice of Deficiency jeopardy assessment (issued per 26 USC 6861), and also in excess of the final U.S. Tax Court order, and where Larson's informal refund requests sought refunds per 26 USC 6861(f), did the Federal Circuit and the Court of Federal Claims err to hold no subject matter jurisdiction and failure to state a claim in the Court of Federal Claims where 26 USC 6861(f) directs the IRS to refund collections made per 26 USC 6861 in excess of a final Tax Court order per se, and **"without the filing of a claim therefor"**, thereby making 26 USC 7422(a) and 26 USC 6511 to be a moot issue and also making 26 USC 6861(f) to be in direct conflict with *U.S. v. Clintwood Elkhorn*, Case No. 07-308 (S. Ct. decided 4-15- 08); *and U.S. v. Dalm*, 494 U.S. 601 (1990); and also in conflict with 26 USC 7422(a) and 26 USC 6511?

QUESTION VI. Where Larson sought refunds from the IRS per 26 USC 6512(a)(2) & (5) [excess collections may be refunded; and collections made before the Tax Court order is final due to assessments made before the Tax Court order is final may be refunded] and per 26 USC 6861(f) [collections made per 26 USC 6861 in excess of a final Tax Court are to be refunded per se] did the Federal Circuit and the Court of Federal Claims err to hold no subject matter jurisdiction and failure to state a claim in the Court of Federal Claims where the Failure to Pay Penalties assessed, per 26 USC 6861, in the IRS's letter dated 7-23-90 were invalid assessments, per 26 USC 6213(a), because they were assessed and collected before the Tax Court order was final in 1995, and because the Notice of Deficiency jeopardy assessment dated 9-16-1985 had not assessed FTP's, nor did the Tax Court order dated 6-30-94 allow them, and therefore the FTP's were collected in excess of the Tax Court order and the FTP's may be refunded per both 26 USC 6512(a)(2) & (5), but because they were assessed and collected under the color of the Notice of Deficiency jeopardy assessment per 26 USC 6861, per 26 USC 6861(f) **they must be refunded per se "without the filing of a claim therefor"?**

TABLE OF CONTENTS

Questions Presented...i
Table of Contents...vi
Table of Authorities..vii
Opinions and Orders Entered Below.....................1
Statement of Basis for Jurisdiction 2
Constitutional Provisions 3
Statement of the Case..4
Summary of the Argument...............................13
Argument...16
Conclusion...38

Appendix – Contents:

Larson v. U.S., No. 2010-5020 (Fed. Cir. decided 5-20-2010).. 1A-10A
Larson v. U.S., Nos. 08-737T, 09-470T (U.S. Court of Federal Claims 9-11-09)........................11A-130A
Larson v. U.S., Nos. 05-55789, 05-55892, 175 F. App'x 814 (9th Cir.2006).........................131A-133A
Larson v. U.S., No. 2010-5020 (Fed. Cir. rehearing denied 9-15-2010)...............................134A-135A
Federal Statutes..................................136A-146A
IRS to Larson letter dated 7-23-90...........147A-149A
IRS to Larson letter dated 9-13-90...........150A-151A
IRS to Larson letter dated 9-24-90...........152A-153A
IRS to Larson letter dated 4-16-91...........154A-155A
Larson's informal refund request dated 11-5-91...156A-158A
U.S. Tax Court decision dated 6-30-94......159A-160A
IRS generated Application of Payments for ty's 1978-1980..161A-164A

TABLE OF AUTHORITIES

Allen v McCurry, 449 U.S. 90 (1980)....................29
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)..22
Comm'r v. Sunnen, 333 U.S. 591 (1948)...........27,28
Computervision Corp. v. U.S., 445 F.3d 1355 (Fed. Cir. 2008)...ii,8,12,22,30
Donahue v. U.S., 33 Fed. Cl. 600; 76 AFTR 2d 95-5110 (RIA) (Cls. Ct. 1995)..................................23
Duane W. Larson v. Comm'r, 1994 RIA T.C. Memo ¶ 94,302..7
Larson v. Comm'r, 67 T.C.M. (CCH) 3154 (1994)...29,35
Kaffenberger v. U.S., 314 F.3d 944 (8th Cir. 2003)..23
Kales v. U.S, 314 U.S. 186, 194 (1941)..................22
Larson v. Comm'r, 60 F.3d 830 (8th Cir. 1995).......35
Larson v. U.S., No. 97-782 (C.D. Cal. Mar. 31, 1998)..9,21
Larson v. U.S., No. 98-902 (C.D. Cal. Nov. 24, 1999)...10
Larson v. U.S., No. 04-1176 (C.D. Cal. May 3, 2005)..11,25
Larson v. U.S., Nos. 05-55789, 05-55892, 175 F. App'x 814 (9th Cir. 2006)................................1,10
Larson v. U.S., Nos. 08-737T, 09-470T (U.S. Court of Federal Claims 9-11-09)................................1,13
Larson v. U.S., No. 2010-5020 (Fed. Cir. decided 5-20-2010).............i,1,4,9,10,11,13,19-22,24,25,26,30,31
Larson v. U.S., No. 2010-5020 (Fed. Cir. rehearing denied 9-15-2010)..1
Ledford v. U.S., 297 F.3d 1378 (Fed. Cir. 2002)...18,21,22,27
Montana v. U.S., 440 U.S. 147 (1979)..................................i,21,24,25,27,29,30

Murphy v. U.S., 69 Fed. Cl. 593 (2006)..................18
U.S. v. Clintwood Elkhorn Mining Co., No. 07-308, (U.S. S. Ct. decided 4-15-08) i,iv,15,18,21,22,37
U.S. v. Dalm, 494 U.S. 601 (1990)............iv,15,21,37
Western Co. of North America v. U.S. 323 F.3d 1024 (Fed. Cir. 2003)...8

STATUTES

26 USC 6213(a)..ii-iv,3,15,16,17,20,27,30,32,34,35,38
26 USC 6511.................................iii,iv,3,15,22,37
26 USC 6511(a)..................i,3,11,18,19,20,21,23,25
26 USC 6511(b)(1)..3,20
26 USC 6512...................................3,15,27,30,36
26 USC 6512(a)(2)..................ii,iii,iv,v,3,34,35,36,38
26 USC 6512(a)(5).........ii,iii,iv,v,3,17,20,34,35,36,38
26 USC 6851..34
26 USC 6852..34
26 USC 6861............................iii,iv,v,3,33,34,36,37
26 USC 6861(a).................................iii,3,32,36,38
26 USC 6861(f)...ii,iii,iv,3,13,15,16,20,27,30,36,37,38
26 USC 7422(a)....................i,iii,iv,3,15,19,22,36,37
26 USC 7422(d)....................................i,3,23,25
26 USC 7481(a)(2)(A)...................................3,35
28 USC 1254(1)..2,3
28 USC 1295(a)(3)..3,4
28 USC 1346(a)(1)..3,18

RULES

S. Ct. Rule 12.7..................................4,7,16,24,34
S. Ct. Rule 13(1) & (3)...2

OTHER

5th Amendment..3
Notice 746 (Rev. 11-2010).....................................5

1982 Tax Equity and Fiscal Responsibility Act of 1982..5

Pub. Law 97-248 sec. 325(a).................................5

Restatement (Second) of Judgments, § 27, comment D (1982)..28

26 C.F.R. § 301.6511(a)-1(a)(2)........................11,25

OPINIONS AND ORDERS ENTERED BELOW.

Larson v. United States, No. 2010-5020 (Fed. Cir. decided 5-20-2010); *Larson v. United States,* Nos. 08-737T, 09-470T (U.S. Court of Federal Claims 9-11-09); *Larson v. United States,* Nos. 05-55789, 05-55892, 175 F. App'x 814 (9th Cir.2006); *Larson v. United States,* No. 2010-5020 (Fed. Cir. rehearing denied 9-15-2010).

STATEMENT OF BASIS FOR JURISDICTION.

The judgment of the Court of Appeals for the Federal Circuit was entered on 5-20-2010. A timely petition for rehearing was denied on 9-15-2010. This Court's Jurisdiction is invoked under 28 USC 1254(1). This petition is timely as filed within 90 days of the rehearing denial per S. Ct Rule13(1) & (3).

CONSTITUTIONAL PROVISIONS.

"No person shall be ...deprived of ...property, without due process of law; ..". 5th Amendment. 26 USC 7422(a); 26 USC 7422(d); 26 USC 6511, & (a); 26 USC 6511(b)(1); 26 USC 6861, & (a) & (f); 26 USC 6213(a); 26 USC 6512, & (a)(2) & (a)(5); 26 USC 7481(a)(2); 28 USC 1254(1); 28 USC 1295(a)(3); 28 USC 1346(a)(1). All Statutes in Appendix.

STATEMENT OF THE CASE.

This Petition for Certiorari seeks review of the judgment from *Larson v. United States*, No. 2010-5020 (Fed. Cir. decided 5-20-2010). The Court of Appeals for the Federal Circuit jurisdiction was found at 28 USC 1295(a)(3). On 9-16-1985 Larsons were served with a Notice of Deficiency jeopardy assessment by the IRS assessing $485,834.83 for tax years (ty's) 1978-1980. "..we have determined the income tax deficiencies as shown... They have been assessed under the internal revenue **laws that apply to jeopardy assessments**." Pl. Appellate Record, Appendix Vol. I, pp.6-7. Quoted per S. Ct. 12.7. Larsons petitioned the U.S. Tax Court for redetermination and were assigned case # 44303-85. On 6-2-86 Larsons paid IRS $17,349.69, and between 10-16-89 and 6-11-90 Larsons made payments totaling to $84,175.00, all of which was applied by IRS to ty's 1978 & 1979. App.161-63A.[1] On 7-23-90 IRS informed Larson that the remaining payoff for the assessed Notice of Deficiency jeopardy assessment dated 9-16-1985 pertaining to ty's 78-80, as of 8-6-90, would be an additional $791,100.00. App.147-49A. Between 8-9-90 and 9-12-90 Larson paid the IRS an additional $953,593.62 thereby over paying the Notice of Deficiency assessments for ty's 78-80 by some $162,493.62, less interest from 8-6-90 to 9-12-90 per IRS letter of 7-23-90.[2] IRS informed

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[1] The "Application of Payments" were constructed by IRS circa 1998. Pl. Appellate Record, Appendix Vol. I, pp. 1-3. A partial reconstruction thereof showing payments and dates is in the Appendix. While all payments are, for the most part, accounted for by IRS there were later numerous internal adjustments and transfers between years. For this reason the Application of Payments do not reflect accurate accounts for ty's 78-80, and they also do not reflect an accurate accounting because they contain the double assessments discussed in this petition. Because this action is concerned with refunds and refund requests the final IRS accounts are less relevant here than the dates the payments were received, which is shown on these documents. The account transcripts for ty's 78-80, as of 12-12-06, are shown in Pl. Appellate Record. Vol. I, pp.138-11 to 138-23.

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[2] While the IRS letter of 7-23-90 does not match exactly the Notice of Deficiency jeopardy assessment dated 9-16-1985, it also does not match an earlier jeopardy assessment dated 8-15-85 which was replaced by the Notice of Deficiency. Relevant parts of both jeopardy assessments are quoted herein, infra. However the amount of $791,100.00 sought by the 7-23-90 letter, when added to the $17,349.69 + $84,175.00 previously paid, for a total of $892,624.69, does correctly pay in full the Notice of Deficiency jeopardy assessment dated 9-16-85 which sought a total of $485,834.83 (i.e. $323,889.88 tax, and $161,944.95 fraud penalties) for tax years 1978-1980, plus the accrued interest thereon until 8-6-90. It is important to be aware that fraud penalties did not accrue interest for tax years before 1988. See *IRS Notice 746* (on IRS website) stating: "Also, we charge interest on fraud and negligence penalties IF the tax returns, including extensions, are due after December 31, 1988." *Notice 746 (Rev. 11-2010).* See also *1982 Tax Equity and Fiscal Responsibility Act of 1982, Pub. Law 97-248 sec. 325(a),* which states **interest was added to fraud penalties on taxes due on or after 9-3-1982**. Published 2007 by CCH. ISBN: 0808015966. **Page 4803**. Since Larson's 1978-80 tax returns were all due no later than 1981 (Pl. Appellate Record, Appendix Vol. 1, pp. 138-11, 138-16, & 139-21) *Pub. Law 97-248 sec. 325(a)* also holds no interest would have accrued for Larson's fraud penalties. The total amount sought by the IRS letter of 7-23-90, plus the previous payments, was then $323,889.88 tax, + $49,090.95 failure to pay penalties, + $357,698.91 interest on the tax and failure to pay penalties, + $161,944.95 fraud penalties = $892,624.69; which Larson overpaid by $162,493.62 by 9-12-90.

Larson on 9-13-90 and again on 9-24-90 that ty's 78-80 as assessed by the Notice of Deficiency of 9-16-85 were paid in full as of 9-12-90. On 9-13-90 IRS Agent Gunderson wrote Larson:

> Based on your previous correspondence relating to the application of payments received by the IRS, it appears to me that ALL assessed liabilities have been paid. Accordingly, I am requesting the release of ALL outstanding Notices of Federal Lien. App.150-51A. On 9-24-90 Gunderson wrote: Based on your recent payments, and your previous correspondence relating to the application of payments received by the IRS, it appears to me that ALL assessed liabilities have - been paid. Accordingly, I have requested the release of all outstanding Notices of Federal Lien. App.152-53A.

Since the only assessed liabilities in play during 1990 was the assessed Notice of Deficiency (hereafter sometimes: ND) dated 9-16-1985, pending redetermination before the U.S. Tax Court, case #44303-85, Gunderson stated all assessed liabilities as assessed by the ND were paid in full as of 9-12-90. Larson filed an informal refund request on 11-5-91 seeking a refund of between $809,573.62 and $866,102.62 as paid during 1989 & 1990. App.156-58A. The IRS did not respond to the informal refund request. Larson also filed a formal refund request, on IRS Form 1040X, dated 1-29-92 seeking refunds of payments made in 1990. In 1993 the Tax Court trial was held. On 6-30-1994 the Tax Court issued Memorandum, *Duane W. Larson v. Comm'r,* 1994 RIA T.C. Memo ¶ 94,302, (Pl. Appellate Record, Appendix Vol. I, pp. 53-62) and its Decision, which affirmed the ND dated 9-16-1985 to the exact same amount of $485,834.83. App.159-60A. On 11-23-94 IRS assessed Larson for ty 79, by Notice of Tax Due: "11/23/94 Add'l tax $120,882.64; 11/23/94 Fraud Penalty $60,441.32; 11/23/94 Interest $439,051.32; less $6,875.44 credit = $613,499.84." Pl. Appellate Record, Appendix Vol. I, pp.72. Quoted per S. Ct. 12.7. Larson could not understand why he was assessed on 11-23-94 because Larson knew he had already paid in full the same amount of $485,834.83 (plus interest) that the Tax Court had found Larson owed for ty's 78-80 in its order of 6-30-94. On 11-23-94 IRS had also assessed another $6,663.56 tax, plus $3,331.78 penalty, plus $13,131.72 interest for ty 80. There was no Notice of Tax Due served for the ty 80 assessment but rather only an internal entry made to IRS internal account records for ty 80, which Larson did not learn of until 2004. Pl. Appellate Record, Appendix Vol. I, p.138-22.

Sometime after 11-23-94 IRS applied Larson's overpayment of $162,493.62 from the 1990 payments to ty 1979. App.162-63A. This is known because as of 9-12-90 Larson had overpaid all assessed liabilities and there were no assessments made between 9-12-90 and 11-23-94. The Application of Payments (Apps.161-64A) total to $1,408,696.86 received between 8-2-86 and 10-21-97 to pay in full the ND assessment dated 9-16-85, plus the 11-23-94 assessments. On 7-23-90 IRS sought a total for payment in full of the ND dated 9-16-85 of: the

$17,349.69 paid on 6-2-86, plus the $84,175.00 paid between 10-16-89 and 6-11-90, (Apps.161-63A) plus an additional $791,100.00 sought in the IRS letter dated 7-23-90 (App.147A) for a total of $892,624.69. But Larson paid $17,349.69 + $84,175.00 + $953,593.62 by 9-12-90 plus the payments made from 4-16-91 to 10-21-97 of $353,493.62 (App.161-64A), making a grand total overcollection by IRS as of 1997 of some $515,987.24. This overpayment paid in full the ND of 9-16-85, plus the additional incorrect assessments dated 11-23-94.

Larson had written the IRS on 12-3-94 & 7-10-96 (Pl. Appellate Record, Appendix Vol. I, pp.73-79 & 82-87) seeking an explanation regarding the 1979 assessment dated 11-23-94. These letters displayed to the IRS that Larson did not know what the assessments of 11-23-94 were for, and Larson sought both clarification and action from IRS. Both of those letters were informal refund requests per *Computervision Corp.v U.S.,* 445 F.3d 1355, ___, (Fed. Cir. 2006) Sec. IA:

> *In Western Co. of North America v. U.S.,* 323 F.3d 1024 (Fed. Cir. 2003), we recognized that the doctrine applies in circumstances in which the taxpayer's action involved a request for information. ...The taxpayer, unaware of what had caused this penalty, repeatedly requested information about the basis for the penalty but did not file a formal claim for a refund. ..We held that the substantial variance doctrine did not bar the taxpayer's refund claim because, during the limitations period,

> Western had "repeatedly requested . . . information that would have allowed filing of an informed claim," and thereby "put the IRS on notice of its challenges to [the] false assessment." Id. at 1034-5.

The IRS again did not respond to either informal refund request. Larson, therefore, made a "best guess" that IRS had violated, with the 11-23-94 assessments, the plea agreement made between Larson and the government dated 8-19-85, as Larson had alleged in his informal refund requests dated 12-3-94 and 7-10-96. Larson filed a complaint (case # SA CV 97-782) in U.S. District Court on 10-3-97. "That suit was dismissed without prejudice on March 31, 1998, because it was filed before the assessments had been paid in full. *See Larson v. United States, No. 97-782 (C.D. Cal. Mar. 31, 1998).*" "The Larsons did not fully satisfy the assessed liabilities until October 21, 1997." *Larson v. United States*, No. 2010-5020 (Fed. Cir. decided 5-20-2010). App.4A. On 4-7-98 Larson filed an informal refund request (Pl. Appellate Record, Appendix Vol. I, pp.90-91) to which IRS again did not respond. On 10-21-98 Larson filed a second complaint in U.S. District Court (case # SA CV 98-902) "guessing" (for lack of information from the IRS) that his cause of action was that IRS had assessed pre-plea agreement interest in violation of the plea agreement, and seeking enforcement of the plea agreement.

> "This time, the district court addressed the claims on the merits and granted

> summary judgment in favor of the government. *See Larson v. United Sates, No. 98-902 (C.D. Cal. Nov. 24, 1999) aff'd, 2 F. App'x 847 (9th Cir. 2001).* ... The court held that Mr. Larson's plea agreement did not prevent the imposition of interest for the period before August 19, 1985; that the plea agreement was not breached by the assessment of interest for that period; and that the Larsons were not entitled to a refund on any ground asserted in that action." *Larson v. United States,* No. 2010-5020 (Fed. Cir. decided 5-20-2010). App.4-5A.

On 8-8-2002 Larson discovered that the difference between a jeopardy assessment dated 8-15-1985 seeking $39,812.23 for ty 1979 (Pl. Appellate Record, Appendix Vol. I, pp. 4-5) and the ND jeopardy assessment dated 9-16-1985 seeking $160,694.87 for ty 1979 (Pl. Appellate. Record, Appendix Vol. I, pp. 6-7) was $120,882.64. This was the exact same amount of tax assessed for ty 79 by the assessment dated 11-23-94. Pl. Appellate Record, Appendix Vol. I, p.72. "...Larson admitted that he was not aware of the alleged overcollection until after that [1998] action had been concluded." *Larson v. United States,* appeal nos. 05-55789 & 05-55892, filed 3-26-06, 175 F App'x 814 (9th Cir. 2006). App.133A. In 2004 upon receipt of Account Transcripts from an IRS audit reconsideration Larson noticed the same "difference" for ty 80 had been assessed on 11-23-94; i.e. $120,430.52 (8-15-85 jeopardy assessment) vs. $127,094.08 (9-16-85 ND jeopardy assessment) = $6,663.56 tax for ty 80. Pl. Appellate Record, Appendix Vol. I, p.138-22. Larson filed a formal IRS Form 1040X dated 8-9-2002 explaining IRS had made an error and assessed $120,882.64 for tax year 1979 TWICE! IRS again did not respond with an explanation, but Larson received refunds of $78,672.16 (including accrued interest) in 2003. Thereafter the refunds stopped. On 10-7-2004 Larson filed a lawsuit in U.S. District Court (case # SA CV 04-1176) seeking a refund of the DOUBLE TAXED assessment for ty 79, dated 11-23-94, plus penalties and interest. "Undeterred, the Larsons continued their efforts to recover tax refunds. *See, e.g., Larson v. United States, No. 04-1176 (C.D. Cal. May 3, 2005) (new claim of* ***double taxation*** *barred by res judicata) aff'd, 175 F App'x 814 (9th Cir. 2006)." Larson v. United States*, No. 2010-5020 (Fed. Cir. decided 5-20-2010). App.6A. This is correct **except** the Federal Circuit erred not to note that the res judicata bar was **not** upheld by the 9th Circuit. Because the 9th Circuit actually held:

> Duane W. Larson paid his tax liabilities in full by October, 1997, but did not file the instant refund claim with the IRS until August 9, 2002. Because the Larsons' did not file their administrative claim for a tax refund within two years of paying the tax the administrative claim was untimely under 26 USC § 6511(a) and 26 C.F.R. § 301.6511(a)-1(a)(2). **THE DISTRICT COURT therefore lacked subject matter**

> jurisdiction over the Larsons' tax refund action. App.132A.

Larson read the case of *Computervision, supra*, discussing refund request amendments. Since IRS had not responded to Larson's refund requests Larson amended numerous refund requests between 4-12-06 and 10-1-07 seeking the excess overcollections for ty's 78-80. Pl. Appellate Record, Appendix Vol. II, pp.139-421. Among these amendments were the informal refund request dated 11-5-91 (pp.141-165, 166-207, 208-240, 275-308, & 407-421) which pertained, in part, to the application of the overpayments made to ty's 78-80 in 1990, but which were not applied by IRS to ty's 78-80 until on or after 11-23-94; and also the payment dated 4-16-91 which was first applied to ty 91 (App.154A) but after 11-23-94 was applied to ty 79. App.162A. The amended informal refund requests dated 11-5-91, record cited above, plus those dated 12-3-94 and 7-10-96 (Pl. Appellate Record, Appendix Vol. II, pp.166-207, 178, 269-274, 275-308) and one informal refund request dated 4-7-98 (pp.141-165, 166-207, 208-240, 275-308) pertained to all payments and to **all applications** of prior payments made between 1991 and 1997. On 7-11-06 Larson filed a supplement to the amendment dated 4-13-06, which had amended refund requests dated 11-5-91, 12-3-94, 7-10-96, and 4-7-98. Pl. Appellate Record, Appendix Vol. I, pp. 139-140, & 275-308. This refund request provided proof of payments totaling to $1,457,581.80 that Larson had paid the IRS for ty's 78-80.

The IRS again did not respond to the amended refund requests and Larson filed IRS administrative appeals. The IRS Appeals Office refunded another $31,770.01 (including accrued interest) in 2008 but otherwise as of 8-21-2008 (Pl. Appellate Record, App. Vol. I, pp.138-87 & 138-88) deferred to the Court of Federal Claims regarding other overpayments, and as to invalid assessments per 26 USC 6213(a) and refunds per 26 USC 6512(a)(2) & (5) (Pl. Appellate Record, Appendix Vol. I, pp.138-62, 138-77 & 138-78; and Vol. II, pp.392, 400, 401) and as to collection in excess of the Tax Court order in violation of 26 USC 6861(f). Pl. Appellate Record, Appendix Vol. II, pp.141, 169, 190, 272. On 10-16-2008 Larson filed a complaint with the U.S. Court of Federal Claims (case # 08-737T). On 9-11-09, on motion to dismiss, and before a trial was held, the trial court dismissed the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. *Larson v. United States*, Nos. 08-737T, 09-470T (U.S. Court of Federal Claims 9-11-09). App.11-130A. Larson appealed to the U.S. Court of Appeals for the Federal Circuit and on 5-20-2010 the Appeals Court affirmed. Lar*son v. United States*, No. 2010-5020 (Fed. Cir. decided 5-20-2010). App.1-10A.

SUMMARY OF THE ARGUMENT.

QUESTION I. One of the U.S. District Courts did not issue a final judgment on the merits, and none of the three District Courts had subject matter jurisdiction because either the tax was not yet paid when the complaint was filed, or due to untimely refund requests, and therefore there could be no res judicata from any district court because res judicata requires a final judgment on the merits, and it also requires the court to be of competent jurisdiction and a court that lacks subject matter jurisdiction cannot be a court of competent jurisdiction.

QUESTION II. There was no res judicata from the U.S. Tax Court because the Tax Court determined only the amount of Larsons' tax liability whereas Larsons' complaint in the CFC sought the refund of collections in excess of the Tax Court's final order. The facts, claims, issues, legal questions, and rights are entirely different for the CFC complaint. By necessity a claim for refund must come after the Tax Court has determined the tax liability because both the Tax Court's final order, and excess collections thereof, are required before a refund can be sought. The statutes require that the Tax Court order be final, and the taxes first be paid in full, before any court can have subject matter jurisdiction over a refund claim. The Tax Court could not have necessarily decided refund issues as part of its tax liability determination because it would not have had subject matter jurisdiction to do so. The Tax Court's order and Memo did not allow the IRS to double assess an additional $191,319.30 in excess of its order.

QUESTION III. The requirement for germaness only applies to **formal** IRS refund request forms 1040X which are amended later, and not to informal refund requests, later amended. Because the refunds sought were sought by **informal** refund requests, which Larson amended in 2006 and 2007, and it was those amended informal refund requests that gave the Court of Federal Claims subject matter jurisdiction in 2008, there could be no germaness requirement that applied to them.

QUESTION IV. The assessments dated 11-23-94 were, as a matter of law, invalid per 26 USC 6213(a) because they were assessed before the Tax Court order was final, and because they were double assessments of taxes that were already assessed and paid in full, the collections made because of those assessments were collections in excess of the Tax Court's order and are to be refunded by statute, in particular 26 USC 6512 and 26 USC 6861(f).

QUESTION V. As a **matter** of **first impression** for the U.S. Supreme Court, *Clintwood* and *Dalm* hold that per 26 USC 7422(a) and 26 USC 6511 refund requests must be timely filed before a refund claim can be sought in court, but 26 USC 6861(f) clearly states that where a collection in excess of a Tax Court order, was assessed per 26 USC 6861, the excess collection shall be made "**without the filing of a claim therefor**". Because 26 USC 6861(f) is in direct conflict with *Clintwood* and *Dalm* a matter of **first impression** is presented.

QUESTION VI. Larsons' complaint sought the reversal of the invalid assessments dated 7-23-90 as assessed and collected before the Tax Court order was final. The CFC did not address this claim, but rather dismissed the complaint. But the refund of these collections in excess of the Tax Court order is refundable per 26 USC 6512, and **must be refunded** 26 USC 6861(f).

ARGUMENT.

Larsons seek Certiorari regarding Counts II & IV of the complaint filed in the U.S. Court of Federal Claims on 10-16-08. The relevant parts thereof are quoted per S. Ct. 12.7.

COUNT II.

> 58. ....[IRS] Gunderson's unauthorized FTP [failure to pay] penalties per 26 USC 6651 make up ...$49,090.95 as Gunderson so stated in his letter of 7-23-90... But, the FTP penalties were in violation of 26 USC 6213(a) because the Tax Court order was not final, so they were invalid when assessed in 1990, and illegally collected in 1990 as well. Moreover, the FTP penalties were not authorized by the Tax Court's order. Anything not specifically allowed by the Tax Court shall not be assessed or collected. .. Consequently, if the FTP penalties were not authorized, then they were invalid assessments...
>
> WHEREFORE, Larson demands judgment against defendant for Specific Performance and asks this Court to order specific performance from the IRS and CIT by ordering them to recalculate

the tax and fraud and interest for tax years 1978-1980, but this time ...without adding in the unauthorized FTP penalties reflected in Gunderson's letter of 7-23-90,.. Appellee Appellate Supplemental Appendix pp. 33-34.

COUNT IV.

73. The assessments made by the IRS dated 11-23-94 were assessments made before the Tax Court order was final. The Tax Court decision was not final until 12-10-1995. The law of 26 USC 6213(a) and 26 USC 6512(a)(5) is that until the Tax Court decision is final the IRS shall not assess, or collect, or levy, or collect by court proceedings. Moreover, Larson had already paid all debts for tax years 1978-1980 in 1990 so he did not owe the IRS for the assessments dated 11-23-1994.

74. On 11-23-94 the IRS did not assess the "entire amount redetermined". Rather they assessed the difference between the Jeopardy Assessments served on 8-15-1985 and the Tax Court's order dated 6-30-1994, but for tax years 1979 and 1980 only. ...[what] is absolutely clear is that [IRS] did know Larson had already paid the entire amount he owed for tax years 1978-1980 by 1990, yet [IRS] assessed anyway on 11-23-94.

> WHEREFORE, Larson demands judgment against defendant for a refund of all the money collected as a result of the assessments dated 11-23-94, as collected either by seizing Larson's overpayments left over from 1990, or by actual collection from Larson, or by any other means including, but not limited to, IRS internal record keeping adjustments, with statutory interest thereon until the date of the return of the money. Appellee Appellate Supplemental Appendix pp. 40-41.

Where subject matter jurisdiction is alleged, "the plaintiff cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction." *Murphy v. U.S.*, 69 Fed. Cl. 593, 600 (2006). "A taxpayer seeking a refund of taxes erroneously or unlawfully assessed OR collected may bring an action against the Government ...in the U.S. Court of Federal Claims." *Clintwood, supra.* Also 28 USC 1346(a)(1). In order for the court to assert jurisdiction over such a claim however, a plaintiff must satisfy the requirements set forth in the Internal Revenue Code. These are: 1.) all taxes assessed must be paid in full before a claim may be filed. "Payment of the assessed taxes in full is a prerequisite to bringing a refund claim." *Ledford v. U.S.*, 297 F.3d 1378, 1382 (Fed. Cir. 2002); 2.) a claim must be filed timely with the Secretary per 26 USC 6511(a) and 26 USC

7422(a); and 3.) The plaintiff must have filed a claim for a refund with the IRS for the amount of the tax at issue in compliance with 26 USC 7422(a).

1.) Larson had paid all assessed taxes, interest, and fraud penalties for ty's 78-80 as of 9-12-90. See 2 IRS letters. App.147-51A. Thereafter Larson paid in full all doubly assessed taxes as assessed on 11-23-94. "The Larsons did not fully satisfy the assessed liabilities until October 21, 1997." *Larson v. United States,* No. 2010-5020 (Fed. Cir. decided 5-20-2010). App.4A.

2.) Larson filed an informal refund request on 11-5-91. App.156A. This was filed within the 2-year rule of 26 USC 6511(a) for payments made, or applied, between 11-5-89 and 11-5-91. Larson amended the 11-5-91 refund request on 4-12-06 again on 4-13-06, see supra. On 11-23-94 the IRS sent Larson another assessment for $613,499.84 for ty 79. Larson sent informal letter refund requests dated 12-3-94 and 7-10-96 seeking an explanation and action. Larson amended both informal letter refund requests in 2006. Supra. These informal refund requests satisfied the 2-year rule for payments made, or applied, between 12-3-92 to 12-3-94 and between 7-10-94 to 7-10-96. After paying in full, in 1997, the taxes doubly assessed for ty's 79 & 80 as assessed on 11-23-94 Larson filed another informal refund request timely on 4-7-98 which he amended in 2006. Supra. This informal refund request satisfied the 2-year rule from 4-7-96 to 4-7-98.

3.) Larson's amended informal refund requests sought the double assessed and excess doubly collected tax, penalty, and interest as collected because of the double assessments dated 11-23-94 as applied to ty's 1978-1980, and sought the refund of taxes collected in excess of the Tax Court order per 26 USC 6861(f). (Pl. Appellate Record, Appendix Vol. II pp.147, 185, 187, 219; 141, 169, 190, 272; and generally pp.141-308). Additionally these amendments sought refund of the taxes as assessed and collected in violation of 26 USC 6213(a) per 26 USC 6512(a)(5) because the Tax Court order was not yet final.

QUESTION I. Regarding *Res Judicata*, *Larson v. United States*, No. 2010-5020 (Fed. Cir. decided 5-20-2010) stated: "The decisions of the ...United States District Court for the Central District of California remain valid and retain their preclusive effect". App.10A.

> The Code further establishes a time limit for filing such a refund claim with the IRS: To receive a refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return, a refund claim must be filed no later than 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later. §6511(a). And §6511(b)(1) mandates that [n]o credit or refund shall be allowed or made if a claim is not filed within the time limits set forth in §6511(a). Read together, the import of these sections is clear: unless a claim for refund of a tax has been

> filed within the time limits imposed by §6511(a), a suit for refund ... may not be maintained in any court. *Dalm, supra,* at 602. *Clintwood, __, supra.*

The Federal Circuit was in error to find Res Judicata for the U.S. District Courts because:

(1.) The 1997 district court lacked subject matter jurisdiction for case # 97-782 per 26 USC 6511(a) because the assessment of 11-23-94 was not paid in full as required before Larson filed the complaint. A "[c]laim for credit or refund of an overpayment ..shall be filed by the taxpayer within ...2 years from **the time the tax was paid...**" 26 USC 6511(a). App.137A. "Payment of the assessed taxes in full is a prerequisite to bringing a refund claim." *Ledford v. U.S.,* 297 F.3d 1378, 1382 (Fed. Cir. 2002).

> The suit was dismissed without prejudice on March 31, 1998, because it was filed before the assessments had been paid in full. *See Larson v. U.S., No. 97-782 (C.D. Cal. Mar. 31, 1998). Larson v. United States,* No. 2010-5020 (Fed. Cir. decided 5-20-2010). App.4A.

Montana, infra, holds that res judicata can attach only: 1.) when there has been a final judgment on the merits, and there was not one in the 1997 district court; and 2.) to determinations from courts of "competent jurisdiction". Any court that lacks subject matter jurisdiction cannot, *a fortiori,* be a court of competent jurisdiction. Therefore there can be no res judicata from the 1997 district court.

The Appeals Court is in direct conflict with *Montana, infra.*

2.) The 1998 District Court also lacked subject matter jurisdiction for case # 98-902 because the informal refund requests dated 11-5-91, 12-3-94, 7-10-96, & 4-7-98 **were not amended until 2006 & 2007.** "..we find that the Larsons were entitled to amend their refund claims in 2006 and 2007 because the IRS did not disallow those claims until 2008.." *Larson v. United States,* No. 2010-5020 (Fed. Cir. decided 5-20-2010). App.10A. An informal letter tax refund request **CANNOT** establish Subject Matter Jurisdiction for a court **until the "formal defects ...have been [1] remedied [2] by amendment [3] filed after the lapse of the statutory period."** *See Kales v. U.S,* 314 U.S. 186, 194 (1941) cited in *Computervision v. U.S., 445 F.3d 1355,* ___, Sec. IA (Fed. Cir. 2006). Subject matter jurisdiction can be raised at any time. "[When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, ...for the purpose of correcting the error of the lower court....." *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541 (1986). See also *U.S. v Clintwood, supra*: "Held: The plain language of 26 USC 7422(a) [App.141-42A] and 6511 [App.137-39A] requires a taxpayer seeking a refund for a tax ....to file a **timely** administrative refund request claim before bringing suit against the Government. Pp.4-12." **Unanimous Court.**

The 1998 district court also did not have subject matter jurisdiction from the formal refund request, IRS form 1040X, dated 1-29-92, because that refund request could **not** apply to payments, or applications of payments, made from 1994 through

1997 because: A refund claim must be filed within 2 years from the time the tax was paid. 26 USC 6511(a). App.137A. Since the $162,493.62 was overpaid on 9-12-90 but **not applied** to ty 79 until on or after 11-23-94, the "applied" over payment was not "legally paid" until after the 11-23-94 assessment created a false balance due, which theretofore had not existed. See *Kaffenberger v. U.S.*, 314 F.3d 944,_ (8th Cir. 2003):

> "*See* I.R.C. § 7422(d) ("The credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability at the time such credit is allowed"); *Donahue v. United States*, 33 Fed.Cl. 600, 605 (1995). See 26 USC 7422(d) at App.142A.

The date money is **internally applied** by the IRS, as overpaid by a taxpayer during a prior year, is considered to be **the time the *tax* was paid** for the purpose of applying refund claims per 26 USC 6511(a). *Donahue v. U.S.,* 33 Fed. Cl. 600, 605, 76 AFTR 2d 95-5110 (RIA) (Cls. Ct. 1995). Also, in 1998, the non-amended form 1040X dated 1-29-92 could only seek refund of payments, or applications, made in 1990 because that is all it asked for:

> See attached letter dated 11-5-91 seeking refunds of the following payments: Tax year 1978) $146,569.08 paid on 9-12-90. Tax year 1979) $120,868.48 paid on 8-23-90; Tax year

> 1979) $53,024.54 paid on 9-12-90; Tax year 1980) $489,111.52 paid on 8-23-90. Pl. Appellate Record, App. Vol. I, pp.31-42. Quoted pp. 32, 36, 40 per S. Ct. 12.7.

Consequently, the 1998 District Court (case # 98-902) could not have had subject matter jurisdiction for payments, or applications, made between 1994 to 1997 based upon the form 1040X **formal** refund request dated 1-29-92, nor upon the as yet non-amended **informal refund** requests and there can be no res judicata from any court that lacks subject matter jurisdiction. *Montana v. U.S.*, 440 U.S. 147, 153 (1979):

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . .

Any court that lacks subject matter jurisdiction cannot, *a fortiori,* be a court of competent jurisdiction. The Appeals Court was incorrect to uphold there was subject matter jurisdiction for the 1998 district court based upon the formal 1040X refund request dated 1-29-92. The Appeals Court is in direct conflict with *Clintwood, supra,* and *Montana, supra,* and is also in direct conflict with 26 USC 7422(d).

3.) The 2004 district court also lacked subject matter jurisdiction for case # 04-1176 per the 9th Circuit's order of 3-29-2006.

> Undeterred, the Larsons continued their efforts to recover tax refunds. *See, e.g., Larson v. United States, No. 04-1176 (C.D. Cal. May 3, 2005) (new claim of* ***double taxation*** *barred by res judicata) aff'd, 175 F App'x 814 (9th Cir. 2006). Larson v. United States,* No. 2010-5020 (Fed. Cir. decided 5-20-2010). App.6A.

This is correct ***except*** the Federal Circuit erred not to note that the res judicata bar was not upheld by the 9th Circuit, because the 9th Circuit actually held:

> Duane W. Larson paid his tax liabilities in full by October, 1997, but did not file the instant refund claim with the IRS until August 9, 2002. Because the Larsons' did not file their administrative claim for a tax refund within two years of paying the tax the administrative claim was untimely under 26 USC § 6511(a) and 26 C.F.R. § 301.6511(a)-1(a)(2). **THE DISTRICT COURT therefore lacked subject matter jurisdiction over the Larsons' tax refund action. App.132A.**

The error was not to recognize that where *Montana, supra,* holds that res judicata can attach only to determinations from courts of "competent jurisdiction", any court that lacks subject matter jurisdiction cannot, *a fortiori,* be a court of competent jurisdiction. Therefore there can be no res judicata from the 2004 district court. The Appeals Court is in direct conflict with *Montana, supra.*

QUESTION II. As to res judicata *Larson v. United States,* No. 2010-5020 (Fed. Cir. decided 5-20-2010) also incorrectly stated: "The decision[] of the Tax Court ...remain[s] valid and retain[s].. [it's] preclusive effect". App.10A.

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies ...Under res *judicata, a final judgment on the merits* bars further claims ..on the same cause of action...once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits... *Montana v. U.S.,* 440 U.S. 147, 153 (1979).

At the outset, the Tax Court could not have had subject matter jurisdiction in 1993, during the trial of redetermination for the ND dated 9-16-1985, to entertain refund request claims and issues, even if such claims and issues had been presented because payment of all assessed taxes must be paid in full before a refund claim may be brought per 26 USC 6511(a) and *Ledford, supra*. The assessments of 11-23-94 were not paid in full until 10-21-1997 therefore the Tax Court would not have had subject matter jurisdiction. Additionally, no court, including the Tax Court, can entertain a refund request per 26 USC 6213(a); 26 USC 6512; or 26 USC 6861(f) **until the Tax Court order is final.** Each statute specifically states that a final Tax Court order is required. Apps.136-37A; 138-39A; & 139-40A.

The Tax Court order was not final until 1995 therefore the Tax Court, in 1993, would have lacked subject matter jurisdiction for that reason as well. *Montana, supra,* holds that res judicata can attach only to determinations from courts of "competent jurisdiction". Any court that lacks subject matter jurisdiction cannot, *a fortiori,* be a court of competent jurisdiction. Therefore there can be no res judicata from the U.S. Tax Court because the Tax Court did not determine Larsons' refund request claims and issues, but if it had attempted to litigate the refund request claims, it would have lacked subject matter to do so.

The seminal res judicata case regarding tax cases is *Comm'r v. Sunnen,* 333 U.S. 591, 597 (1948).

> The general rule of res judicata applies to repetitious suits involving the same cause of action...". p.597. "..These same concepts are applicable in the federal income tax field. ...Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a

> judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. P.598.

To be barred by res judicata an issue must be identical to one raised in a previous action, per *Sunnen, supra,* and it must have been actually litigated therein. An issue is actually litigated when it is 1.) appropriately raised by the pleadings or otherwise; 2.) submitted for determination; and 3.) determined by the court. ***Restatement (Second) of Judgments, § 27, comment D (1982).***

The tax liabilities question was raised, submitted, and determined by the Tax Court as to the exact amount owed by Larsons. That determination found $485,834.83 in taxes and penalties was owed by Larson for ty's 1978-1980. That determination is firm, is barred from relitigation by res judicata, and is undisputed by Larsons. The amount collected in excess of that determination, however, is by statute, subject to refund and that is the right and claim at issue in Larsons' complaint. These claims and issues present a completely different set of facts than those presented in the Tax Court. Whereas the facts in the Tax Court determined the tax liability, the facts of Larsons' refund complaint pertain to collections in excess of that tax liability. The Tax Court itself has never reviewed or determined any claim or issue regarding collections in excess of the final Tax Court order.

The refund claims and issues were not actually litigated in the Tax Court, nor could they have been so litigated had they been raised because: the Tax Court order did not issue until 1994; and the excess collections were not complete until 1997, and the Tax Court was not final until 1995.

Additionally, claims for refunds in the Tax Court would not have been necessary to the Tax Court's judgment. Relitigation of an issue of fact or law in a suit based on a different cause of action may be precluded if the court decides that issue was necessary to the judgment in the first action per *Allen v McCurry,* 449 U.S. 90, 94 (1980) (citing to *Montana v. U.S.,* 440 U.S. at 153). Such was not the case here. The issue of the refund of amounts collected in excess of the Tax Court's order was not necessary to the Tax Court's judgment as to how much was owed by Larson. The Tax Court's order determining the amount owed by Larson was, rather, a step towards Larsons' refund cause of action inasmuch as until the Tax Court issued its order Larsons' claims for refunds of collections in excess of the Tax Court's order could not be possible. It would have been impossible to seek a refund of collections made in excess of the Tax Court's order in the Tax Court itself in 1993, before the Tax Court had determined what was actually owed and issued its order in 1994. Consequently, the issue regarding refunds could not have been necessary to the Tax Court's judgment.

Lastly, the Tax Court Decision and Memo (*Larson v. Comm'r,* 67 T.C.M. (CCH) 3154 (1994)) did not allow the IRS to first assess $485,834.83 on 9-16-85, and thereafter allow IRS to double assess an additional $191,131.93 on 11-23-94. There is no res judicata bar from the Tax Court applicable to

Larson's seeking the refund of doubly collected taxes. The Federal Circuit was in error to uphold the CFC's erroneous holding that the Tax Court's decision presented a res judicata bar to Larsons' refund request based complaint. The Appeals Court is in direct conflict with *Montana, supra,* and 26 USC 6213(a); 26 USC 6512; and 26 USC 6861(f).

QUESTION III. *Larson v. United States,* No. 2010-5020 (Fed. Cir. decided 5-20-2010) stated: "..we agree with the trial court's conclusions that the amendments were not germane..." App.10A. The Appeals Court was in error to hold Larson's amended informal refund requests "were not germane". Per *Computervision,* germaness of amended refund requests **applies only** to **formal refund requests**, i.e. IRS Forms 1040X, which are later amended by a second IRS Form 1040X. *See Computervision, supra, Sect. ID:*

> ..the **germaneness** doctrine, may allow relief. This fourth exception ONLY **applies where the taxpayer (1) files a formal claim** within the limitations period making a specific [*36] claim; and (2) after the limitations period but, while the IRS still has jurisdiction over the claim, files a **formal amendment** raising a new legal theory -- not specifically raised in the original claim -- that is **"germane"** to the original claim....

Since the **formal** IRS Form 1040X dated 1-29-92 is not applicable to the refunds sought here, i.e.

those that were paid, or applied, during 1994-1997 (see Question I, sec. 2); and because the Appeals Court and the CFC found the amended formal refund requests were not germane in any event, this rules out the **formal IRS form 1040X refund request**. The only remaining refund requests which are applicable here are the **informal** refund requests dated 11-5-91, 12-3-94, 7-10-96, & 4-7-98 as legally amended during 2006 & 2007. "..[W]e find that the Larsons were entitled to amend their refund claims in 2006 and 2007..". *Larson v. United States,* No. 2010-5020 (Fed. Cir. decided 5-20-2010) App.10A. Per *Computervision, supra, Sect. IA* germaness is **not a requirement** for amended **informal** refund requests. Since Larson seeks the refund of money paid, or applied by the IRS, to ty's 78-80 between 1994-1997 by amended informal refund requests, and **not** by amended formal refund requests, germaness was not a requirement and the Appeals Court was in error to affirm the germaness bar to them. The Appeals Court is in direct conflict with *Computervision, supra.*

QUESTION IV. *Larson v. United States,* No. 2010-5020 (Fed. Cir. decided 5-20-2010) states:

> On November 23, 1994, following the Tax Court's decision, the IRS issued a notice of tax due for 1979 and 1980. The amounts due were adjusted downward to account for jeopardy assessments that the IRS had previously made on August 15, 1995, pursuant to 26 USC 6861(a). The IRS

> also added interest dating back to 1979 and 1980, respectively. App.10A.

While this explains how the IRS incorrectly double assessed, it fails to point out that the assessments dated 11-23-94 were invalid as a matter of law per 26 USC 6213(a) because the Tax Court order was not yet final on 11-23-94. Both the Notice of Deficiency jeopardy assessment dated 9-16-85 and the jeopardy assessment dated 8-15-85 assessed per 26 USC 6861(a). But the amounts assessed in the jeopardy assessments dated 8-15-85 (Pl. Appellate Record, Appendix Vol. I, pp.4-5) were **also included within the Notice of Deficiency jeopardy assessment dated 9-16-85 and they had already been assessed once already as of 9-16-85.** Pl. Appellate Record, Appendix Vol. I, pp.6-7. The ND jeopardy assessment dated 9-16-85 was the assessment at issue in the Tax Court. **The jeopardy assessment dated 8-15-85 no longer existed.** It had been incorporated into, and replaced by, the **Notice of Deficiency** jeopardy assessment dated 9-16-85.

> **Jeopardy Assessment of 8-15-85.** .. based upon information available at this time, I have approved assessment of tax and additional amounts determined to be due as reflected in the attached computations:
>
> | Taxable Period | Tax | Penalty | Interest |
> |---|---|---|---|
> | 1978 | $51,361.31 | $25,680.66 | $53,001.81 |
> | 1979 | $39,812.23 | $19,906.12 | $37,108.40 |

1980$120,430.52 $60,215.26 $92,299.60

..If an agreement is not reached with the Internal Revenue Service, a notice of deficiency is required by law to be issued within 60 days from the date of the jeopardy assessment made under section 6861 of the Internal Revenue Code.

Notice of Deficiency jeopardy assessment dated 9-16-85. This letter is to notify you-as required by law-that we have determined the income tax deficiencies as shown... They have been assessed under the internal revenue laws that apply to jeopardy assessments.

Tax Year Ended
December
31, 1978 Income Tax $36,100.93
Addition to the tax-section
6653(b)..............................$18,050.47

December
31, 1979 Income Tax $160,694.87
Addition to the tax-section
6653(b)..............................$80,347.44

December
31, 1980 Income Tax $127,094.08
Addition to the tax-section
6653(b)............................$63,547.04

> (Record cited, supra. Quoted per S. Ct 12.7).

Therefore the assessments dated 11-23-94, which assessed the difference between the jeopardy assessment dated 8-15-85 and the Notice of Deficiency jeopardy assessment dated 9-16-85 did in fact **DOUBLE ASSESS** those amounts on 11-23-94. Per 26 USC 6512(a)(2) & 26 USC 6512(a)(5) both the amounts excessively collected and the amounts collected before the Tax Court order was final (26 USC 6213(a)) may be refunded.

> 26 USC 6213(a): ..Except as otherwise provided in section 6851, 6852, or 6861 no **assessment of a deficiency** in respect of any tax ... and no levy or proceeding in court for its collection shall be made, begun, or prosecuted...until the decision of the Tax Court has become final. ...**and a refund may be ordered** ...of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. App.136-37A.

> 26 USC 6512(a): ..no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court **except** - (2) As to any amount **collected in excess** of an amount computed in accordance with the decision of the Tax Court which has become final, ...(5) As

> to any amount collected **within the period** during which the Secretary is **prohibited from making the assessment** or from collecting by levy or through a proceeding in court - under the provisions of section 6213(a). App.138-39A.

The Tax Court order issued on 6-30-94 was not final until 1995, after the appeal of the Tax Court decision; *Larson v. Comm'r,* 67 T.C.M. (CCH) 3154 (1994), aff'd, 60 F.3d 830 (8th Cir. 1995). Per 26 USC 7481(a)(2)(A). "(a)..decision of Tax Court shall become final..(2) Decision affirmed or appeal dismissed...(A) upon the expiration of the time allowed for filing a petition for Certiorari..". App.142-45A. Therefore the double assessments of 11-23-94 could NOT legally have been assessed per 26 USC 6213(a) until after the Tax Court order was final in 1995. As a matter of law, the assessments dated 11-23-94 were invalid on their face.

Because the ND jeopardy assessment was paid in full in 1990, and thereafter upheld by the Tax court on 6-30-94, the ND could not thereafter be increased by assessing an additional amount on 11-23-94 because the debt was already paid in full in 1990. The fact that the assessments of 11-23-94 were double assessments under color of the ND, and that the IRS collected those amounts in full, means that: 1.) the ND, which was issued per the jeopardy assessment law of 26 USC 6861, and which; 2.) the Tax Court order upheld, were both excessively over collected. As a matter of law money collected in excess of a Tax Court order can be refunded per 26

USC 6512(a)(2), but per 26 USC 6861(f) money collected in excess of a Tax Court order **must be refunded per se**. Discussed further, infra.

QUESTION V. Subject matter jurisdiction per 26 USC 7422(a) & 26 USC 6511, as to over collections for ty's 78-80, was provided by Larson through timely filed, and amended refund requests. But this appears to be a moot issue because the ND jeopardy assessment dated 9-16-85 was issued per 26 USC 6861, i.e. per jeopardy assessment law. App.139-41A. "..[W]e have determined the income tax deficiencies as shown... They have been assessed under the internal revenue **laws that apply to jeopardy assessments**." Pl. Appellate Record, Appendix Vol. I, pp.6-7. The Tax Court decision of 6-30-94 upheld the ND jeopardy assessment. The assessments of 11-23-94 were double assessments, as assessed per 26 USC 6861, of part of the tax and penalty already assessed in the Notice of Deficiency jeopardy assessment of 9-16-85, and therefore the assessments of 11-23-94 were assessed and excess collected per 26 USC 6861. Per 26 USC 6861(f) a refund request is not required when there is an excess overcollection of a Tax Court order.

> When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then ...**If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited**

> **or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor.** 26 USC 6861(f). App.140-41A.

Even so Larson raised 26 USC 6861(f) in his amended refund requests. Pl. Appellate. Record, App. Vol. II, pp.141, 169, 190, 272. But 26 USC 6861(f) amendments and refund requests are not relevant here because any money collected by the IRS in excess of the Tax Court decision of 6-30-94 was collected in excess of the amount determined owed by the Tax Court and must be refunded per se. I.e. the amount of $515,987.24 collected, or applied by IRS, from 1994-1997 due to the 11-23-94 assessments was assessed and collected, per 26 USC 6861, in excess of the Tax Court decision and must be refunded per se because that money was collected without jurisdiction to do so per 26 USC 6861(f).

Refund requests provide subject matter jurisdiction for the courts per 26 USC 7422(a) and 26 USC 6511. *Clintwood, supra* and *Dalm, supra.* However, 26 USC 6861(f) plainly states that refund requests are **not required** for the refund of collections made per 26 USC 6861 in excess of the final Tax Court order. This is a matter of **first impression** for the Supreme Court because 26 USC 6861(f) is in direct conflict with *Clintwood, supra,* and *Dalm, supra,* and it is also in conflict 26 USC 7422(a) and 26 USC 6511.

QUESTION VI. The assessments seeking "failure to pay penalties" as assessed in the IRS letter dated 7-23-90 (App.147-49A) were invalid per

26 USC 6213(a) because the Tax Court order was not final. Therefore the collections made before the Tax Court order was final, because of those assessments, may be refunded per 26 USC 6512(a)(5). Additionally, because the collection of the FTP's was in excess of the Tax Court order the collected FTP's may be refunded per 26 USC 6512(a)(2). This is because neither the ND nor the Tax Court order included FTP's therefore IRS lacked jurisdiction to assess and collect them. Only taxes and penalties authorized by the Tax Court order can be legally collected, and the FTP's were not assessed previously by the ND, nor were they authorized by the Tax Court order. App.159-60A.

The FTP's assessed, under color of the ND, i.e. 26 USC 6861(a), in the 7-23-90 letter, were collected in excess of the Tax Court's order because the Tax Court order affirmed the ND, which was paid in full by 9-12-90. The collection of the FTP's (total of $49,090.95 for ty's 78-80) was collection, in 1990, in excess of the Tax Court's order dated 6-30-94 and per 26 USC 6512(a)(2) can be refunded, **but they must be refunded** per 26 USC 6861(f). Discussed supra. This means the actual overpayment for ty's 1978-1980 was $515,987.24 + $49,090.95 = $565,078.19. The CFC's dismissal for lack of subject matter jurisdiction and failure to state a claim did not address the assessments dated 7-23-90 as presented in Count II of the complaint. See, supra.

CONCLUSION.

Larsons seek Certiorari and an order from this Court remanding this case to the Court of Appeals for the Federal Circuit with directions to vacate the CFCs' order of 9-11-09, (case # 08-737T, 09-470T) dismissing Larsons' complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted because:

the CFC did have subject matter jurisdiction and Larsons' complaint did state claims upon which relief could be granted because relief could be granted in Larsons' complaint at Counts II and IV, because there was no res judicata from either the U.S. District Courts or from the U.S. Tax Court for Larsons' complaint;

and because germaneness did not apply to Larsons' amended informal refund requests;

and because the double assessments dated 11-23-94 for ty's 79 & 80 were invalid both as a matter of law and fact;

and because a claim was stated for the Failure to Pay penalties assessed on 7-23-90 because they were assessed before the Tax Court order was final and were collected in excess of the Tax order;

and due to the excess double collections, and the partial refunds made over the years, Larsons seek an order, as part of the order from the Court of Appeals to the CFC, that the CFC shall order the IRS to calculate the correct amount of over collected tax, penalties, and interest and determine the correct amount to be refunded, plus interest thereon, which the CFC shall then order to be refunded to Larsons; because although $565,078.19 appears to be the correct amount to be refunded (less prior refunds) the improper assessments of 11-23-94 for ty 79 assessed $613,499.94, and the improper assessments of 11-23-94 for ty 80 assessed $23,127.06, and the improper assessments of 7-23-90 for ty's 78-80 assessed $49,090.95, which indicates an actual over assessment and over collection of $685,717.95, but Larsons themselves cannot account for the difference between $685,717.95 and $565,078.19.

Respectfully submitted;

Duane W. Larson; JD; MBA; BCh – *Pro Se*
Pamela A. Larson; B.S.N.; R.N. - *Pro Se*
23580 Carneros Court
Murrieta, Ca. 92562
951-813-3190
dwlarson48@yahoo.com

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

DUANE W. LARSON,
Plaintiff-Appellant,

and

PAMELA A. LARSON,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

2010-5020

Appeal from the United States Court of Federal Claims in consolidated case Nos. 08-CV-737 and 09-CV-470, Judge Marian Blank Horn.

Decided: May 20, 2010

DUANE W. LARSON, of Murrieta, California, pro se.

PAMELA A. LARSON, of Murrieta, California, pro se.

RACHEL I. WOLLITZER, Attorney, Appellate Section, Tax Division, United States Department of Justice, of Washington, DC, for defendant-appellee. With her on the brief were JOHN A. DICICCO, Acting Assistant Attorney General.

Before BRYSON, GAJARSA, and MOORE, *Circuit Judges*.

PER CURIAM.

DECISION

Duane Larson and Pamela Larson appeal the dis-missal of their tax refund claims for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. We *affirm*.

BACKGROUND

This is the latest in a series of tax refund suits filed by the Larsons. The impetus for the refund suits dates back to 1985, when Mr. Larson was investigated for drug trafficking and faced charges of criminal tax evasion for tax years 1978, 1979, and 1980. Mr. Larson pleaded guilty to tax evasion for the 1979 tax year, but conceded the accuracy of the tax computations for all three tax years.

On September 16, 1985, the IRS issued a notice of deficiency for 1978, 1979, and 1980. The Larsons filed suit challenging the notice of deficiency, but the Tax Court affirmed the full amount of the deficiencies and penalties in 1994, after some delay due to Mr. Larson's incarceration. *See Larson v.*

Comm'r, 67 T.C.M. (CCH) 3154 (1994), *aff'd*, 60 F.3d 830 (8th Cir. 1995). LARSON v. US 3

On November 23, 1994, following the Tax Court's decision, the IRS issued a notice of tax due for 1979 and 1980. The amounts due were adjusted downward to account for jeopardy assessments that the IRS had previously made on August 15, 1985, pursuant to 26 U.S.C. § 6861(a). The IRS also added interest dating back to 1979 and 1980, respectively. The Larsons did not fully satisfy the assessed liabilities until October 21, 1997.

Between 1991 and 1998, Mr. Larson submitted several informal refund requests to the IRS. Initially, he raised the same arguments as those that were asserted in the Tax Court action. After the Tax Court's decision, he claimed that the IRS had improperly charged interest for the years preceding his 1985 guilty plea. The IRS did not immediately act on those refund claims, although the IRS ultimately disallowed them in 2008.

After receiving no response from the IRS to their re-fund claims, the Larsons filed suit on October 3, 1997, in the United States District Court for the Central District of California seeking a refund of the pre-1985 interest. That suit was dismissed without prejudice on March 31, 1998, because it was filed before the assessments had been paid in full. *See Larson v. United States*, No. 97-782 (C.D. Cal. Mar. 31, 1998). On October 21, 1998, the Larsons reinstituted their action seeking a refund of the pre-1985 interest. This time, the district court addressed the claims on the merits and granted summary judgment in favor of the government. *See Larson v. United States*, No. 98-902 (C.D. Cal. Nov. 24, 1999), *aff'd*, 2 F. App'x 847 (9th Cir. 2001). The district court held that it did not have jurisdiction over the Larsons' request for declaratory relief. However, the court exercised jurisdiction over their claim for a refund and addressed the merits of that claim. The court held that Mr. Larson's plea agreement did not prevent the imposition of interest for the period before

August 19, 1985; that the plea agreement was not breached by the assessment of interest for that period; and that the Larsons were not entitled to a refund on any other ground asserted in that action.

Undeterred, the Larsons continued their efforts to re-cover tax refunds. *See, e.g., Larson v. United States*, No. 04-1176 (C.D. Cal. May 3, 2005) (new claim of double taxation barred by res judicata), *aff'd*, 175 F. App'x 814 (9th Cir. 2006). The present appeal stems from a series of 15 amended returns filed by the Larsons during 2006 and 2007, in which they sought refunds for tax years 1978, 1979, 1980, 1986, 1988, 1989, and 1991 under a variety of theories.

The Court of Federal Claims grouped the Larsons' claims into four categories. First, the court dismissed the refund claims for 1978, 1979, and 1980 because the amended returns filed by the Larsons in 2006 and 2007 were untimely and because the refund claims did not relate back to earlier refund claims filed between 1991 and 1998. The court held that those earlier claims could not be revived or amended because they had already been fully adjudicated and were no longer pending. In the alternative, the court found that the amended returns were not germane to the earlier refund claims, and were barred in any event by collateral estoppel and res judicata.

Second, the court dismissed the Larsons' refund claim for 1986. The court construed that claim to be an attempt to resurrect refund claims filed in 1991 and 1992 through amended returns filed in 2006 and 2007. Again, the court held that the amended returns were untimely, that the Larsons could not amend refund claims that were no longer pending, and that the new refund claims were not germane to the earlier refund claims. Alternatively, the court held that the refund claim was never articulated with sufficient detail in the earlier refund requests and that it was not until 2006 that the Larsons made clear the basis of that claim—at which point the claim was untimely.

Third, the court dismissed the argument that the IRS had improperly transferred payments for 1988, 1989, and 1991 to other tax years. The court found that the Larsons had failed to raise that argument in any of their amended returns and that it was therefore barred by the doctrine of variance. The court also ruled that the argument failed on the merits because the Larsons had not yet filed re-turns for those tax years at the time of the relevant payments; for that reason, the IRS had discretion under 26 U.S.C. § 6402(a) to apply overpayments to previous outstanding tax liabilities.

Finally, the court dismissed the Larsons' request for a refund of the sales proceeds of 256 gold coins that were pledged as bond collateral in Mr. Larson's criminal case. The court addressed that claim on its merits and concluded that the IRS lawfully obtained possession of the gold coins by serving notice of levy in order to collect upon the August 15, 1985, jeopardy assessments.

DISCUSSION

On appeal, the only issue of substance raised by the Larsons is that their earlier refund claims, although received by the IRS, were never "filed" with the Secretary of the Treasury as required by 26 U.S.C. § 7422(a). The Larsons allege that those refund claims were ignored by the IRS because the

Larsons were secretly designated as "Illegal Tax Protestors," a fact they did not learn until sometime after 1998 when Congress invalidated those designations.

The Larsons claim that the government's failure to "file" their refund claims with the Secretary of the Treasury has two consequences. First, it renders all the prior court decisions adjudicating their claims void for lack of subject matter jurisdiction, thus depriving those decisions of res judicata effect. Second, it means that the unfiled refund claims remained viable and were properly amended when the Larsons made their submissions to the IRS in 2006 and 2007.

The Larsons' arguments are flawed at the outset be-cause any claim that is received by the IRS is deemed to have been "filed with the Secretary." *See Jones v. United States*, 226 F.2d 24, 28 (9th Cir. 1955) ("The 'filing' of a return or a claim for refund by a taxpayer is completed when the return or claim reaches the collector's office."). The fact that the IRS failed to address the Larsons' re-fund claims until 2008 does not mean those claims were not "filed" with the Secretary. The decisions of the Tax Court and the United States District Court for the Central District of California remain valid and retain their preclusive effect. Although we find that the Larsons were entitled to amend their refund claims in 2006 and 2007 because the IRS did not disallow those claims until 2008, we agree with the trial court's conclusions that the amendments were not germane and that the amended claims were precluded by res judicata. Because we find no error in any of the other rulings by the Court of Federal Claims, we affirm that court's judgment in its entirety. AFFIRMED.

IN THE
UNITED STATES COURT OF FEDERAL CLAIMS

Nos. 08-737T, 09-470T
Filed: September 11, 2009
* * * * * * * * * * * * * *

DUANE W. LARSON, pro se,
PAMELA A. LARSON, pro se,
Plaintiffs,
v.
UNITED STATES,
Defendant.
****

Taxation; Refund of Federal Income Tax; Interest; Res Judicata; Collateral Estoppel; Subject Matter Jurisdiction; Failure to State a Claim.

Duane W. Larson and **Pamela A. Larson**, Murrieta, CA, pro se plaintiffs.

Fredrick C. Crombie, Trial Attorney, Court of Federal Claims Section, Tax Division,United States Department of Justice, Washington, D.C., for the defendant. With him were **Steven I. Frahm**, Chief, Court of Federal Claims Section, and **John A. DiCicco**, Acting Assistant Attorney General.

OPINION

HORN, J.

FINDINGS OF FACT

The two consolidated cases, case nos. 08-737T and 09-470T, involve disputed claims of federal income tax refunds allegedly owed to plaintiffs Duane W. Larson and Pamela A. Larson for tax years 1978, 1979, 1980, 1986, 1988, 1989 and 1991. Defendant, the United States, seeks to dismiss the plaintiffs' claims in their entirety, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC), for lack of subject matter jurisdiction, or, in the alternative, pursuant to RCFC 12(b)(6), for failure to state a claim upon which relief can be granted. These are the eighth and ninth lawsuits filed by the plaintiffs regarding their tax liability in federal court, including appeals.

Case Nos. 08-737T and 09-470T

Plaintiffs initiated this recent round of litigation on October 16, 2008, when case no. 08-737T was filed. Then on July 21, 2009, plaintiffs filed a second lawsuit in this court, case no. 09-470T. The plaintiffs argue ten separate claims for relief:1

Tax years 1978, 1979 and 1980

- Count I: Seeks a refund of $964,399.07, plus interest, allegedly collected throughout August and September 1990, on the theory that the alleged

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1 Plaintiffs also make allegations that IRS employees used the power of "distraint" and "extortion," and forced "involuntary servitude" by "harassment," making "threats," and engaging in "malicious acts" against the plaintiffs, although plaintiffs do not supply any evidence to buttress these claims. Moreover, because this court neither has jurisdiction to adjudicate criminal justice claims, Joshua v. United States, 17 F.3d 378, 379 (Fed. Cir. 1994), nor actions based on tortuous acts, Keene Corp. v. United States, 508 U.S. 200, 214 (1993), Rick's Mushroom Service, Inc. v. United States, 521 F.3d 1338, 1343 (Fed. Cir. 2008), this opinion does not address such allegations raised by the plaintiffs.

collections violated 26 U.S.C. §§ 6213(a) and 6215(a) (1976).

- Count II: Requests an order for an additional, independent, forensic audit of tax years 1978, 1979 and 1980, and to remove allegedly illegally assessed failure to pay (FTP) penalties, which, according to the plaintiffs, were not authorized by the United States Tax Court ruling.[2]
- Count III: Reasserts the request for a "forensic" audit of 1978, 1979 and 1980 to determine whether plaintiffs satisfied their tax liabilities in August and September 1990.
- Count IV: Seeks refunds of amounts paid, plus interest, pursuant to the November 23, 1994 Notice of Deficiency, following plaintiffs' alleged previous full payment of their tax obligation.
- Count V: Seeks a refund of $189,758.00, plus interest, which plaintiffs claim was paid with respect to tax years 1985-1989, 1991, and 1992, but was applied to tax year 1979.
- Count VIII: Seeks a refund of interest charged on fraud penalties with respect to tax years 1978, 1979 and 1980.
- Count IX: Seeks a refund or transfer to the Social Security Agency of social security taxes paid for tax years 1978, 1979 and 1980.
- Count X: Seeks a refund of $17,349.69, together with statutory interest, for 256 gold coins allegedly illegally levied upon and sold by the Internal

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[2] Larson v. Comm'r, 67 T.C.M. (CCH) 3154 (1994), aff'd, 60 F.3d 830 (8th Cir. 1995) table).

Revenue Service (IRS) in 1986, with the proceeds applied to plaintiffs' tax year 1978 liabilities.

Tax year 1986

- Count VII: Seeks a refund of $16,825.45 in alleged overpayments allegedly lost or misplaced by the IRS.

Tax years 1988, 1989 and 1991

- Count VI: Seeks a refund in the amount of $22,439.24, plus interest, as a result of the IRS allegedly transferring amounts from tax years 1988, 1989 and 1991 to satisfy plaintiffs' liabilities for tax years 1978-1980.

In essence, the plaintiffs present a nucleus of three claims: (1) allegedly "excess" amounts "illegally collected" with respect to tax years 1978-1980; (2) $16,825.45 of allegedly "misplaced money" by the IRS for tax year 1986; and (3) assessment of allegedly "special damages," including interest and penalties, that accrued on un[illegible] liabilities for tax years 1988, 1989 and 1991. Plaintiffs' repetitive, interwoven, convoluted claims and erratic history of filing their tax returns, making payments on their tax liabilities and requesting refunds, require the court to set forth the procedural history in sufficient detail in order to separate and resolve their claims. Because the record and the complaint provided to the court are, at best, not well organized, the court has done its best to identify the salient facts.

Tax years 1978, 1979 and 1980

In 1985, plaintiff Duane Larson faced charges of criminal tax evasion for the tax years 1978, 1979 and 1980 under 26 U.S.C § 7201.[3] In response to these charges, Mr. Larson agreed to an August 19, 1985 plea bargain under which he pled guilty to evading the payment of his 1979 federal income taxes. As part of the plea agreement, Mr. Larson conceded the accuracy of the criminal tax computations for 1978, 1979 and 1980, which reflected understatements of income for each of these years.[4]

After the IRS established the plaintiffs' criminal tax liability for the years 1978, 1979 and 1980, the IRS, on two separate occasions, assessed applicable taxes, penalties, and interest. Believing the collection of the plaintiffs' accounts to be in jeopardy, the IRS applied jeopardy assessments for the three tax years in question.[5] Subsequently, on September 16, 1985, the IRS executed an updated calculation of plaintiffs' deficient accounts based on the civil tax fraud charges, and issued a Notice of

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[3] Section 7201 states:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 . . ., or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> 26 U.S.C. § 7201 (1976).

[4] Defendant calculated the criminal tax understatements for the years 1978, 1979, and 1980 as $34,487 23, $158,839.97, and $125,168.18, respectively.

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[5] Defendant's calculation of plaintiffs' federal income tax jeopardy assessments are as follows:

Year	Tax	Penalty	Interest
1978	$51,361.31	$25,680.66	$53,001.81
1979	$39,812.23	$19,906.12	$37,108.40
1980	$120,430.52	$60,215.26	$92,288.60

Jeopardy assessments are defined in 26 U.S.C. § 6861(a):

> If the Secretary believes that the assessment or collection of a deficiency, asdefined in section 6211, will be jeopardized by delay, he shall . . . immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof.

26 U.S.C. § 6861(a) (1976); see also Comm'r v. Hendrickson, 873 F.2d 1018, 1020 (7th Cir. 1989).

Deficiency.[6] In response to the IRS’ assessment of civil tax fraud penalties, Mr. Larson filed an action contesting the actions by the IRS in the United States Tax Court on December 12, 1985. In the Tax Court action, Mr. Larson challenged the IRS’ assessment of civil tax fraud penalties on a number of grounds:

(a) The IRS’ notice of deficiency was arbitrary and capricious.

(b) The IRS’ use of the “net worth” method to reconstruct plaintiff’s income was not appropriate.

(c) The Internal Revenue Code (I.R.C.) § 6653(b) civil tax fraud penalties were incorrectly assessed.

(d) Plaintiffs should be able to employ “income averaging” in calculating deficiencies for tax years 1978, 1979 and 1980.

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[6] The IRS’ calculation of plaintiffs’ federal income tax deficiency to include penalties for civil tax liability are as follows:

Year	Deficiency	Additions (per 26 U.S.C. § 6653(b))
1978	$36,100.93	$18,050.47
1979	$160,694.87	$80,347.44
1980	$127,094.08	$63,547.04

The court notes that the amounts calculated above differ to a degree from the criminal tax calculations, as the “net worth” method was used to establish plaintiffs’ income for the deficiencies. Additionally, these deficiencies were not assessed until after the United States Tax Court issued its June 29, 1994 opinion, Larson v. Comm’r, 67 T.C.M (CCH) 3154, affirming the IRS’ calculation of the proposed deficiencies. However, at the time of the Tax Court ruling, the plaintiffs already had paid the proposed deficiency assessments for tax years 1978 and 1980. Thus, only the deficiency for tax year 1979 remained outstanding at the time of the Tax Court’s affirmation of the IRS’ deficiency determinations against the plaintiffs.

(e) The deficiency assessment was outside of the statute of limitations for tax years 1978, 1979 and 1980.[7]

Larson v. Comm'r, 67 T.C.M (CCH) 3154, 1994 WL 285892, at *4-13 (U.S. Tax Ct. June 29, 1994).

Before resolution of the Tax Court litigation, the plaintiffs initiated payments toward the balance of their outstanding, contested, federal tax deficiency. The plaintiffs eventually paid the entire outstanding federal tax deficiency balances for tax years 1978 and 1980.[8] Id. The Tax Court's opinion, issued on June 29, 1994, affirmed the IRS Commissioner's calculation of the plaintiffs' tax deficiencies for the tax years 1978, 1979 and 1980, found that the plaintiffs' actions were indicative of fraud for the stated tax years, and determined that the 26 U.S.C. § 6653(b) (1976) civil tax penalties were justifiably applied to the stated tax years. Id. Subsequent to the Tax Court's judgment, the supplementary tax, penalties, and interest previously assessed by the IRS on September 16, 1985, upheld by the Tax Court, but absent from the August 1985 jeopardy assessment, were assessed to the plaintiffs' 1978-1980 accounts.[9]

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[7] Before the resolution of the Tax Court litigation, the plaintiffs filed two informal refund claims for tax years 1978, 1979. and 1980 on November 5, 1991 and January 29, 1992, relying upon identical legal grounds as proposed in the Tax Court action.

[8] The plaintiffs paid their federal tax deficiencies in full for the tax years of 1978 and 1980 on September 2, 1991 and August 23, 1990, respectively.

The United States Court of Appeals for the Eighth Circuit affirmed the Tax Court's ruling. Larson v. Comm'r, 60 F.3d 830 (8th Cir. 1995) (table). Following this decision, the plaintiffs reconsidered their approach regarding the disputed refund claims for 1978, 1979 and 1980, and sought to appeal directly to the IRS. Specifically, on December 3, 1994, the plaintiffs addressed a letter to the IRS in which they claimed that the proposed assessment of interest applied to unpaid balances for tax years 1978, 1979 and 1980 violated the terms of plaintiff Duane Larson's 1985, criminal plea bargain. After apparently receiving no response from the IRS, plaintiffs also initiated contact with the IRS' Problem Resolution Office, located in Laguna Niguel, California. Shortly thereafter, on July 10, 1996, plaintiffs sent a second letter to the IRS echoing the claims of the December 1994 letter.

On October 3, 1997, before paying the outstanding balance on the 1979 tax liability, Mr. Larson once again sought a judicial remedy, this time in the United States District Court for the

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[9] For tax year 1979, the IRS assessed an additional $120,883.00 in taxes, $60,441.00 in penalties, and $439,051.00 in interest. The IRS assessed an additional $6,664.00 in taxes, $3,332.00 in penalties, and $13,132.00 in interest for tax year 1980. However, for tax year 1978, $15,260.00 in taxes and $7,630.00 in penalties were abated. At the time of this assessment, plaintiffs already had satisfied their 1978 and 1980 liabilities, and only the 1979 liabilities remained open.

Central District of California,10 by filing a claim for a refund of the accrued interest that had been assessed on their outstanding 1978, 1979 and 1980 federal tax liabilities prior to acceptance of the August 19, 1985 plea bargain. However, the California District Court dismissed plaintiffs claim based on lack of subject matter jurisdiction on March 31, 1998.

Following the March 1998 District Court ruling, plaintiffs again applied for remedial relief for their claim that interest had been improperly assessed on tax years 1978, 1979 and 1980 before enforcement of plaintiff Duane Larson's plea bargain in August 1985.11 In this particular instance, plaintiffs again appealed directly to the IRS, submitting a claim for refunds pertaining to the allegedly improper interest that was assessed on the plaintiffs' accounts. After concluding no response had been received from the IRS, yet another action in the Central District of California was initiated, on

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10 Larson v. United States, No. 97-782 (C.D. Cal. filed Oct. 3,1997).

11 Specifically, Mr. Larson argued that, based on the plea agreement signed on August 19, 1985, the United States had forfeited its right to collect interest on the plaintiffs' outstanding federal income tax balances before August 19, 1985, which, after review of the plea agreement in the record, clearly is not the case.

October 21, 1998,[12] repeating arguments offered in the previous March 31, 1998 District Court action. In moving to dismiss plaintiff's reincarnation of the March 1998 claims, the United States again argued that the court lacked sufficient subject matter jurisdiction to hear the case. The United States also argued that plaintiffs had not filed the refund claims for tax years 1978 and 1980 within the two-year statute of limitations required by 26 U.S.C. § 6511(a).[13] As before, the District Court found that the plea agreement "was not breached by the Service's assessment of pre-August 19, 1985 interest," and dismissed the case, with prejudice. On appeal, the Ninth Circuit Court of Appeals affirmed the District Court.[14] Thereafter, the plaintiffs, once again, sought relief directly from the IRS, this time on the theory that the plaintiffs had been illegally subjected to double taxation. On August 9, 2002, plaintiffs filed an amended return (IRS Form 1040X) for tax year 1979 to request a refund due to their alleged full payment of all tax liabilities by 1990, and the subsequent receipt of an allegedly erroneous

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[12] Larson v. United States, No. 98-902 (C.D. Cal. filed Oct. 21,1998).

[13] Section 6511(a) states:

> Claim for credit or refund of an overpayment of any tax imposed by this title. . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C. § 6511(a)(1976).

[14] See Larson v. United States, 2 F. App'x 847 (9th Cir. 2001).

Notice of Tax Due on November 23, 1994, asserting that the plaintiffs owed an additional $613,499.84 for tax years 1978, 1979 and 1980. Plaintiffs now allege that the Notice of Tax Due constituted "some form of back interest on a debt that had long been paid in full," and that the plaintiffs had attempted to obtain a refund through the court system in their 1998 District Court action.15 Further, plaintiffs now also contend that the $613,499.84 was an erroneous, back debt which improperly affected the outcome of the plaintiffs' 1998 District Court litigation, as the $613,499.84 was not the real issue. According to plaintiffs, in order to correct this mistaken assertion, the 2002 Form 1040X refund request was filed "on the correct basis of DOUBLE TAXATION." (emphasis in original).

Defendant admits that there may have been some level of confusion at the IRS with regard to the handling of plaintiffs' 1040X amended return. The court notes that this is not surprising, given the constant back and forth with the IRS and the erratic filing of yearly tax returns, amendments and payments by plaintiffs. Specifically, defendant states that "[t]he IRS, mistakenly concluding that the amended return constituted a *timely* refund claim and apparently unaware of the prior litigation involving 1978-1980, agreed to review his payment history for those years." (emphasis in original).

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15 See Larson v. United States, No. 98-902 (C.D. Cal. 1998).

As a result of the IRS audit, plaintiffs initiated two new, nearly identical District Court actions: Duane W. and Pamela A. Larson v. United States, No. 04-939 (C.D. Cal. Filed July 9, 2004) and Duane W. and Pamela A. Larson v. United States, No. 04-1176 (C.D. Cal. filed Oct. 7, 2004). The basis for each of these actions involved the plaintiffs' attempt at reclamation of either the lesser of $1,000,000.00 or economic damages under 26 U.S.C. §§ 7433 and 7426(h) (1976).16 Plaintiffs alleged that these damages stem from the IRS' supposed, overzealous collection of tax liabilities from the plaintiffs for the tax years 1978, 1979 and 1980, in violation of the 1994 Tax Court order and the 1985 plea bargain.17 Plaintiffs further asserted that $877,016.76 they allegedly paid on September 12, 1990 to fulfill outstanding tax liabilities for the years in question,

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16 These two sections of the United States Code cover civil actions by taxpayers for damages stemming from negligent, reckless, or intentional disregard of Code provisions by IRS employees in connection with collection activities. However, as the defendant notes, both of these actions must be brought in United States District Court.

17 Plaintiffs also included the tax years of 1988, 1989, and 1991 in their complaint for remedial refunds for alleged overpayment of federal taxes. The District Court's opinion, however, included no information pertaining to these years. Larson v. United States, No. 04-1176 (C.D. Cal. 2005). Nor did the parties' briefs focus on the inclusion of these years.

1978, 1979 and 1980, "disappeared" from the IRS records, and plaintiffs were not given credit for that amount. Due to this alleged "disappearance," the plaintiffs asserted that an additional $636,626.90 was assessed, in excess of what plaintiffs allegedly owed for tax years 1979 and 1980. Additionally, plaintiffs claimed that during the 1998 District Court litigation, the fact of the "disappearance" of $877,016.76 was not disclosed to the court or to any parties in the case. Thus, plaintiffs argued that the alleged "disappearance" of $877,016.76 precluded effective litigation of the issues in the 1998 District Court case. Plaintiffs argued that the defendant's claim that the 2005 action was foreclosed under the doctrine of res judicata should be rejected.18

The District Court, however, granted the United States' motion for summary judgment on May 3, 2005, on the grounds of res judicata:

> The Larsons seek to obtain a refund of taxes that were collected pursuant to a November 23, 1994 jeopardy assessment that they contend was in excess of the Tax Court's decision in 1994. This "excess amount" is the same overpayment that Mr. Larson sought to recover in the 1998 Action. As the Court reached a decision on the merits in the 1998 Action and dismissed all of Mr.

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[18] In the 2005 District Court action, plaintiffs also claimed that the IRS had intentionally violated provisions of 26 U.S.C. §§ 6015(a), 6212(a), 6213(a) and 6503(a)(1) (1976), by calculating jeopardy assessments for tax years 1978, 1979 and 1980 before the 1994 Tax Court proceedings were final.

> Larson's claims for overpayment arising from the same subject tax years, plaintiffs' claims in this matter are barred by the doctrine of res judicata irrespective of Mr. Larson's ability to devise creative new theories of recovery.

Larson v. United States, No. 04-1176, slip op. at 4 (C.D. Cal. 2005).19

Plaintiffs appealed the District Court's judgment on May 20, 2005, in which they argued, inter alia, that the Form 1040X was not their only refund request, and that they had made refund requests from November 5, 1991 through January 12, 1998, which were attached and incorporated by reference into the April 7, 1998 refund request, and which, they argued, then became part of the Form 1040X refund request. Despite the plaintiffs' contentions on appeal, the Ninth Circuit affirmed the District Court's judgment:

> Duane Larson paid his tax liabilities in full by October 1997, but did not file the instant refund claim with the IRS until August 9, 2002. Because the Larsons did not file their administrative claim for a tax refund within two years of paying the tax, the administrative claim was untimely under 26 U.S.C. §

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19 Plaintiffs' second (and identical) complaint was dismissed about one year later, "since the Amended Pleading is identical to the Amended Pleading that plaintiffs filed in [theearlier No. 04-1176 proceeding] . . . this action clearly is barred by res judicata." Larson v. United States, 04-939, slip op. at 5 (C.D. Cal. 2006) (emphasis in original).

> 6511(a) and 26 C.F.R. § 301.6511(a)-(1)(a)(2). The district court therefore lacked subject matter jurisdiction over the Larson's tax refund action.

Larson v. United States, 175 F. App'x 814 (9th Cir. 2006). On the heels of the Ninth Circuit's ruling, the plaintiffs continued to actively pursue a favorable resolution of their tax refund claims during the period from April 12, 2006 to October 1, 2007, filing fifteen additional Forms 1040X with the IRS that purported to amend alleged informal claims for tax years 1978-1980. The plaintiffs continued to rely on the previously discredited grounds asserted in the 2004 actions, basing these "new" amendments on claims that the plaintiffs were "excessively double assessed" on their tax liabilities, and that the IRS calculations of interest for 1978-1980 were erroneous. The IRS denied plaintiffs' claims in full, resulting in the plaintiffs' filing of an appeal at the IRS. However, in what the defendant classifies as a mistaken acceptance of these double assessment claims20 by the Riverside (California) Appeals

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20 The defendant claims that:

> The [Riverside] Appeals Office apparently misinterpreted legal precedents governing the timeliness (or untimeliness) of purported amendments to informal claims for refund. . . . The Appeals office was also apparently unaware of the fact or the effect of the prior litigation involving those years. This is not surprising, given that, as reflected in the parties' exhibits, plaintiffs filed their various returns, claims, and correspondence over many years with different IRS offices . . . .

Office, the plaintiffs received credits and refunds in connection with their 1978-1980 accounts.[21]

10 Tax year 1986

The plaintiffs satisfied their outstanding liabilities for tax year 1986 by December 9, 1987. However, plaintiffs mailed a $6,000.00 check to the IRS on May 23, 1990 for application to "any tax liabilities, as needed, for the years 1987-1989." Because no returns for tax years 1985-1989 had been filed on behalf of the plaintiffs at that time, the IRS applied the $6,000.00 check as a credit to the plaintiffs' 1986 account. Subsequently, on August 13, 1990, plaintiffs mailed another payment, totaling $10,825.45, with the instructions that its entirety was to be applied to their 1986 account. But, due to the fact that the plaintiffs had already satisfied their 1986 liabilities, the two payments were combined into a $16,825.45 credit for the 1986 tax year.

Although plaintiffs sent the IRS multiple requests for refunds of the 1986 tax year credit, only three of the requests fell within the 26 U.S.C. § 6511(a) statute of limitations. However, none of the three letters contained specific language asking the IRS to refund the exact $16,825.45 credit from tax year 1986. It was not until December 4, 2006 that the plaintiffs filed a Form 1040X, specifically stating that the 1986 tax year credit of $16,825.45 that plaintiffs claimed had been "over collect[ed]."

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[21] The changes in plaintiffs' accounts for 1978-1980 were crediting $22,968.43 in interest to the 1978 account; reduction of $8,801.58 in interest charged for late payment on the 1978 account; issuance of, according to defendant, erroneous refund in the amount of $31,770.01 with respect to the 1978 account; and confirmation of zero balances for tax years 1978-1980.

The IRS disallowed the December 4, 2006 claims, but has since commenced an investigation into the allegedly missing $16,825.45. Following the plaintiffs' filing of the complaint in this court, however, the IRS did not decide the appeal on the issue.

Tax years 1988, 1990 and 1991

From February to August 1990, plaintiffs made a number of payments toward deficiencies for tax years 1989 and 1990. Additionally, in April 1991, the plaintiffs made payments to be applied to tax year 1991.[22] However, the plaintiffs had not filed taxes for those years, and in accordance with 26 U.S.C. § 6402(a),[23] the IRS applied the account credits from tax years 1989, 1990, and 1991 to plaintiffs' remaining outstanding liability for tax year 1979. Plaintiffs later mailed a May 18, 1992 letter to the IRS acknowledging that they, the plaintiffs, had not yet filed returns for tax years 1986 through 1992, and requested that the credits previously mailed to the IRS by plaintiffs be refunded to them, rather than applied to outstanding tax year liabilities. Eventually, on September 12, 1994, plaintiffs filed their tax returns for tax years 1988, 1989 and 1991, claiming that they owed nothing in income taxes for those years. The IRS disagreed that no taxes were owed and assessed taxes, penalties, and interest to the 1988, 1989 and 1991 tax years. The IRS had applied what plaintiffs tried to prepay for those years to tax year 1979, on which plaintiffs still owed back taxes. The plaintiffs paid their assessed tax liabilities in full by October 21, 1997, permitting the IRS to issue a number of refunds to the plaintiffs over the course of 1999.[24] Finally, on February 15, 2007, the plaintiffs once again filed two Forms 1040X for tax years 1988 and 1989, claiming "increase[d] capital loss carryovers to tax year 2005, by claiming additional capital loss credits for 1988 and 1989."

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[22] Plaintiffs' attempted designated payments totaled $36,800.00 toward tax year 1988, $60,000.00 toward tax year 1989, and $46,973.00 toward tax year 1991.

[23] The text of 26 U.S.C. § 6402(a) states:

> In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c) and (d), refund any balance to such person.

26 U.S.C. § 6402(a) (1988).

DISCUSSION

Jurisdiction

When a plaintiff brings an action before a federal court, he or she first must establish proper jurisdiction in the court before the merits of any action may be evaluated. The plaintiffs have the burden of establishing such jurisdiction by a preponderance of the evidence. See McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936); Taylor v. United States, 303 F.3d 1357, 1359 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2002); see also Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103-04 (1998).

In order for this court to have jurisdiction over a plaintiff's complaint, the Tucker Act, 28 U.S.C. § 1491(a)(1) (2006), requires that the plaintiff identify an independent substantive right enforceable against the United States for money damages. The Tucker Act states:

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[24] On July 19, 1999, the IRS issued a $5,733.08 refund for tax year 1991. On December 6, 1999, a $698.84 refund was issued.

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). As interpreted by the United States Supreme Court, this Act waives sovereign immunity to allow jurisdiction over claims (1) founded on express or implied contracts with the United States, (2) seeking a refund from a prior payment made to the government or (3) based on federal constitutional, statutory, or regulatory law mandating compensation by the federal government for damages sustained. See United States v. Testan, 424 U.S. 392, 400, reh'g denied, 425 U.S. 957 (1976) (citing Eastport Steamship Corp. v. United States, 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1009 (1967)); Palmer v. United States, 168 F.3d 1310, 1314 (Fed. Cir. 1999); Stinson, Lyons & Bustamante, P.A. v. United States, 33 Fed. Cl. 474, 478 (1995), aff'd, 79 F.3d 136 (Fed. Cir. 1996).

"Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States . . . ." United States v. Mitchell, 463 U.S. 206, 216 (1983); see also Eastport 12 Steamship Corp. v. United States, 178 Ct. Cl. at 605, 372 F.2d at 1007. To prove that a statute or regulation is money mandating, plaintiff must demonstrate that the source of substantive law "relied upon can fairly be interpreted as mandating compensation by the federal government for the damage sustained." United States v. Mitchell, 463 U.S. at 216-17 (quoting United States v. Testan, 424 U.S. at 400); see also In re United States, 463 F.3d 1328, 1333 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2006), cert. denied, 128 S. Ct. 50 (2007). "Additionally, the specific authority granting money relief must be distinct from [the] Tucker Act itself." Cottrell v. United States, 42 Fed. Cl. 144, 152 (1998). "If the court's conclusion is that the source as alleged and pleaded is not money mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction, a Rule 12(b)(1) dismissal -- the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act." Fisher v. United States, 402 F.3d 1167, 1173 (Fed. Cir. 2005); see also Doe v. United States, 74 Fed. Cl. 794, 796 (2006). The United States Court of Federal Claims has the "'undisputed' . . . authority to adjudicate tax refund claims." Buser v. United States, 85 Fed. Cl. 248, 256 (2009) (quoting CNG Transmission Mgmt. VEBA v. United States, 84 Fed. Cl. 327, 328 (2008)); see also United States v. Clintwood Elkhorn Mining Co., 128 S. Ct. 1511, 1514

(2008) ("A taxpayer seeking a refund of taxes erroneously or unlawfully assessed or collected may bring an action against the Government . . . in the United States Court of Federal Claims.").

Standard of review

Defendant moves to dismiss the current action based on a lack of subject matter jurisdiction under RCFC 12(b)(1), as the plaintiffs' claims are effectively barred by the applicable statute of limitations and res judicata, or, in the alternative, for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6). "Subject matter jurisdiction may be challenged at any time by the parties, or by the court sua sponte." Folden v. United States, 379 F.3d 1344, 1354 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005); see also Rick's Mushroom Serv., Inc. v. United States, 521 F.3d at 1346; Fanning, Phillips, Molnar v. West, 160 F.3d 717, 720 (Fed. Cir. 1998) (quoting Booth v. United States, 990 F.2d 617, 620 (Fed. Cir.), reh'g denied (Fed. Cir. 1993)); United States v. Newport News Shipbuilding and Dry Dock Co., 933 F.2d 996, 998 n.1 (Fed. Cir. 1991); North Star Alaska Hous. Corp. v. United States, 76 Fed. Cl. 158, 185, appeal dismissed, 226 F. App'x 1004 (2007). "In fact, a court has a duty to inquire into its jurisdiction to hear and decide a case." Special Devices, Inc. v. OEA, Inc., 269 F.3d 1340, 1342 (Fed. Cir. 2001) (citing Johannsen v. Pay Less Drug Stores N.W., Inc., 918 F.2d 160, 161 (Fed. Cir. 1990)); see also View Eng'g, Inc. v. Robotic Vision Sys., Inc., 115 F.3d 962, 963 (Fed. Cir. 1997) ("[C]ourts must always look to their jurisdiction, whether the parties raise the issue or not.").

Pursuant to Rule 8(a) of the United States Court of Federal Claims (RCFC) and Rule 8(a) of the Federal Rules of Civil Procedure, a plaintiff need only state in the complaint "a short and plain statement of the grounds for the court's jurisdiction...." RCFC 8(a)(1); Fed. R. Civ. P. 8(a)(1). However, "[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." Holley v. United States, 124 F.3d 1462, 1465 (Fed. Cir.) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)), reh'g denied (Fed. Cir. 1997); see also Edelmann v. United States, 76 Fed. Cl. 376, 379 (2007). "Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim." Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed. Cir. 1998); see also McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1363 n.9 (Fed. Cir. 2007) (quoting C. Wright and A. Miller, Federal Practice and Procedure § 1286 (3d ed. 2004)); Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981) ("[C]onclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss."), aff'd, 460 U.S. 325 (1983).

When deciding a case based on a lack of subject matter jurisdiction, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); United Pac. Ins. Co. v. United States, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006); Boise Cascade Corp. v. United States, 296 F.3d 1339, 1343 (Fed. Cir.), reh'g and reh'g en banc denied (Fed.

Cir. 2002), cert. denied, 538 U.S. 906 (2003); Pixton v. B & B Plastics, Inc., 291 F.3d 1324, 1326 (Fed. Cir. 2002); Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1338 (Fed. Cir. 2001) (quoting New Valley Corp. v. United States, 119 F.3d 1576, 1580 (Fed. Cir. 1997)), cert. denied, 535 U.S. 1096 (2002); Boyle v. United States, 200 F.3d 1369, 1372 (Fed. Cir. 2000).

In examining what must be plead in order to state a claim upon which relief can be granted, under both Rule 8(a)(2) of the Rules of the United States Court of Federal Claims and Rule (8)(a)(2) of the Federal Rules of Civil Procedure, a plaintiff need only state in the complaint "a short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2); Fed. R. Civ. P. 8(a)(2). See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). The United States Supreme Court, in the Bell Atlantic Corporation case, stated that:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the * * * "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, see C. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that

> merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), see, e.g., Neitzke v. Williams, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atlantic Corp. v. Twombly, 550 U.S. at 555 (footnote and other citations omitted; brackets and omissions in original); see also Cambridge v. United States, 558 F.3d 1331, 1335 (Fed. Cir. 2009) ("[A] plaintiff must plead factual allegations that support a facially 'plausible' claim to relief in order to avoid dismissal for failure to state a claim." (quoting Bell Atlantic Corp. v. United States, 550 U.S. at 570)); Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009) ("The factual allegations must be enough to raise a right to relief above the speculative level. This does not require the plaintiff to set out in detail the facts upon which the claim is based, but enough facts to state a claim to relief that is plausible on its face." (citing Bell Atlantic Corp. v. United States, 550 U.S. at 570)), reh'g denied (Fed. Cir.), cert. denied, 129 S. Ct. 2878 (2009).

When deciding on a motion to dismiss based on failure to state a claim, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the

non-movant's favor. See Cambridge v. United States, 558 F.3d at 1335 (citing Papasan v. Allain, 478 U.S. 265, 283 (1986)); Cary v. United States, 552 F.3d at 1376 (citing Gould Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)); Anaheim Gardens v. United States, 444 F.3d 1309, 1315 (Fed. Cir.), reh'g denied (Fed Cir. 2006); Boyle v. United States, 200 F.3d at 1372; Perez v. United States, 156 F.3d 1366, 1370 (Fed. Cir. 1998); Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995); Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1169-70 (Fed. Cir.) (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)), cert. denied, 516 U.S. 820 (1995); Hamlet v. United States, 873 F.2d 1414, 1416 (Fed. Cir. 1989); Ho v. U.S., 49 Fed. Cl. 96, 100 (2001), aff'd, 30 F. App'x 964 (Fed. Cir. 2002); Alaska v. United States, 32 Fed. Cl. 689, 695 (1995), appeal dismissed, 86 F.3d 1178 (Fed. Cir. 1996) (table). If a defendant or the court challenges jurisdiction or plaintiffs' claim for relief, however, the plaintiffs cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. at 189; see also Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988); Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399, 404-05 (1994). "A motion to dismiss under Rule [12(b)(6)] for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not under the law entitle him to a remedy." Perez v. United States, 156 F.3d 1366, 1370 (Fed. Cir. 1998).

A complaint also can be dismissed on a Rule 12(b)(6) motion "when its allegations indicate the existence of an affirmative defense that will bar the award of any remedy." 5BCharles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 at 708 (3d ed. 2008). To qualify, the defense "has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion." Id.; see also Richmon\Fredericksburg & Potomac R.R. Co. v. Forst, 4 F.3d 244, 250 (4th Cir. 1993) (citing Wright & Miller, § 1357 at 348-49 (2d ed. 1990)); McCalden v. Cal. Library Ass'n, 955 F.2d 1214, 1219 (9th Cir. 1990) (holding that, although Rule 12(b)(6) motions are not generally intended to address the merits of affirmative defenses, in the limited circumstances when the complaint gives rise to one, the defense may be raised under Rule 12(b)(6), as long as it appears clearly on the face of the complaint), cert. denied, 504 U.S. 957 (1992).

Affirmative defenses that have been considered under a Rule 12(b)(6) motion to dismiss, include, among others, "various types of estoppel" and "the barring effect of res judicata and related preclusion principles." 5B Wright & Miller, Federal Practice and Procedure § 1357 at 722, 728 (3d ed. 2008); see also Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 n.3 (1981) (noting that the dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits); Day v. Moscow, 955 F.2d 807, 811 (2d Cir.) (holding that the affirmative defense of res judicata may be upheld on a motion to dismiss under Rule 12(b)(6) "when all relevant facts are shown by the court's own records, of which the court takes notice"), cert. denied, 506 U.S. 821 (1992). Moreover, "a court may take judicial notice of facts from a prior judicial proceeding when the res judicata defense raises no disputed issue of fact." Andrews v. Daw, 201 F.3d 521, 524 n.1 (4th Cir. 2000); see, e.g., United States v. Ford Motor Co., 497 F.3d 1331, 1337-38 (Fed. Cir.) (Ford Motor Company filed a Rule 12(b)(6) motion to dismiss, asserting the doctrine of issue preclusion, which the Federal Circuit declined to embrace after comparing what was at issue in the prior litigation to the present litigation), reh'g and reh'g en banc denied (Fed. Cir. 2007). In order to determine whether the plaintiffs have met their required burdens, "the court may look beyond the pleadings and 'inquire into jurisdictional facts' in order to determine whether jurisdiction exists." Lechliter v. United States, 70 Fed. Cl. 536, 543 (quoting Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991)), recons. granted in part on other grounds, 72 Fed. Cl. 17 (2006).

Although at least one of the plaintiffs (Duane W. Larson) claims to be the holder of a Juris Doctorate degree,25 the plaintiffs filed their action in this court pro se. Despite Mr. Larson's legal training, the complaint is repetitive, convoluted, and confusing, as are the disorganized exhibits. In general, when determining whether a complaint filed by a pro se plaintiff is sufficient to invoke review by a court, pro se plaintiffs are entitled to liberal construction of their pleadings. See Haines v. Kerner, 404 U.S. 519, 520-21 (requiring that allegations contained in a pro

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25 However, Mr. Larson indicates that he is not admitted as a member of any State or Federal Bar.

se complaint be held to "less stringent standards than formal pleadings drafted by lawyers"), reh'g denied, 405 U.S. 948 (1972); see also Hughes v. Rowe, 449 U.S. 5, 9-10(1980); Estelle v. Gamble, 429 U.S. 97, 106 (1976), reh'g denied, 429 U.S. 1066 (1977). However, "there is no 'duty [on the part] of the trial court . . . to create a claim which [plaintiff] has not spelled out in his [or her] pleading....'" Scogin v. United States, 33 Fed. Cl. 285, 293 (1995) (quoting Clark v. Nat'l Travelers Life Ins. Co., 518 F.2d 1167, 1169 (6th Cir. 1975)) (alterations in original); see also Minehan v. United States, 75 Fed. Cl. 249, 253 (2007). The court, therefore, has done its best to give order to disorganization and to address the substance of plaintiffs' claims.

The Court of Federal Claims does not have jurisdiction over plaintiffs' amended 2006-2007 refund claims for tax years 1978, 1979, and 1980

Defendant claims that, pursuant to RCFC 12(b)(1), this court does not have subject matter jurisdiction over the plaintiffs' federal income tax refund claims for the years of 1978, 1979 and 1980. Specifically, defendant alleges:

(1) plaintiffs are collaterally estopped from amending their formal or informal refund requests filed during the years 1991-1998;

(2) plaintiffs' alleged amendments did not relate back to the original refund filing, as the plaintiffs' amendments (a) were not made before the 1991-1998 claims were resolved by the court, and (b) are not "germane" to the 1991-1998 requests; and

(3) in the alternative, the plaintiffs' 1978-1980 claims are barred by the doctrine of res judicata, and

should be dismissed under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted.

For this court to exercise its jurisdiction over a plaintiff's federal tax refund claim, a petitioning party must first satisfy the tax refund schematic detailed in Title 26 of the Internal Revenue Code, (see, e.g., 26 U.S.C. § 7422 (2006) and 26 U.S.C. § 6511 (2006)), which establishes that a claim for refund must be filed with the IRS before filing suit in federal court, and establishes strict deadlines for filing such claims. See United States v. Clintwood Elkhorn Mining Co., 128 S. Ct. at 1514; United States v. Dalm, 494 U.S. 596, 609-10, reh'g denied, 495 U.S. 941 (1990); Buser v. United States, 85 Fed. Cl. at 256. Moreover, for a refund claim, the court only may hear claims for which the petitioning taxpayer has fulfilled all of his or her tax liabilities for the tax year in question before the refund claim is heard. Flora v. United States, 357 U.S. 63, 72-73 (1958) ("Flora I"), aff'd on reh'g, 362 U.S. 145 ("Flora II"), reh'g denied, 362 U.S. 972 (1960). In Flora II, the United States Supreme Court again clearly stated that 28 U.S.C. § 1346(a)(1) requires "payment of the full tax before suit . . . ."[26] Flora II, 362 U.S. at 150-51; see also Shore v. United States, 9 F.3d 1524, 1526 (Fed. Cir. 1993) ("The full payment requirement of Section 1346(a)(1) and Flora applies equally to tax refund suits brought in the Court of Federal Claims . . . .") (citing Tonasket v. United States, 218 Ct. Cl. 709, 711-12, 590 F.2d 343(1978)). Before filing a claim in federal court, a plaintiff also is required to file a claim with the IRS for the amount of the alleged refund, pursuant to 26 U.S.C. § 7422(a), which states:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to

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[26] Section 1346(a)(1) reads:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . .
>
> 28 U.S.C. § 1346(a)(1) (2006).

> the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a); see also Computervision Corp. v. United States, 445 F.3d 1355, 1363 (Fed. Cir.), reh'g and reh'g en banc denied, 467 F.3d 1322 (Fed. Cir. 2006), cert. denied, 549 U.S. 1338 (2007). Essentially, section 7422(a) functions as a waiver of the government's sovereign immunity in tax refund suits. Chicago Milwaukee Corp. v. United States, 40 F.3d 373, 374 (Fed. Cir. 1994); see also Gluck v. United States, 84 Fed. Cl. 609, 613 (2008). "[S]ection 7422(a) creates a jurisdictional prerequisite to filing a refund suit." Id. (citing Chicago Milwaukee Corp. v. United States, 40 F.3d at 374 (citing Burlington N., Inc. v. United States, 231 Ct. Cl. 222, 684 F.2d 866, 868 (1982))).

Further, in order for a tax refund case to be duly filed in a federal court under section 7422(a), the filing must comply with the timing requirements set forth in 26 U.S.C. § 6511(a):

> The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied. When waiver legislation contains a statute of limitations, the limitations provision constitutes a

> condition on the waiver of sovereign immunity.

Block v. North Dakota ex rel. Bd. of Univ. and School Lands, 461 U.S. 273, 287 (1983); see also Buser v. United States, 85 Fed. Cl. at 257. To reiterate, the applicable language of section 6511(a) states:

> Claim for credit or refund of an overpayment of any tax imposed by this title. . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid....

26 U.S.C.§ 6511(a); see also 26 C.F.R. § 301.6511(a)-(1)(2009)("In the case of any tax . . . : If a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever of such periods expires the later."). This statutory and regulatory language specifically imposes a "filing deadline" for tax refund claims brought under this section of the United States Code. Comm'r v. Lundy, 516 U.S. 235, 240 (1996) (emphasis in original); see also United States v. Clintwood Elkhorn Mining Co., 128 S. Ct. at 1516 (determining that the language of section 6511(a) "clearly state[s] that taxpayers must comply with the Code's refund scheme before bringing suit, including the filing of a timely administrative claim.").

> In sum, Congress has provided strict statutory guidelines laying out the statute of limitations for the filing of a federal tax refund claim: Read together, the import of these sections is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been "erroneously," "illegally," or "wrongfully collected," §§ 1346(a)(1), 7422(a), may not be maintained in any court. United States v. Dalm, 494 U.S. at 602.

The plaintiffs argue that they duly filed amended refund requests, specifically, IRS Forms 1040X, in 2006 and 2007, for federal tax refunds stemming from the 1978, 1979 and 1980 tax years. Plaintiffs claim that the 2006-2007 Forms 1040X are valid amendments to their numerous, informal refund claims sent to the IRS between 1991 and1998.27

In response, defendant argues that the plaintiffs' amended claims for tax years 1978-1980 are invalid because: (1) plaintiffs cannot meet the legal requirements of an amendment to an earlier claim, since the amendments are not germane to the 1991-1998 refund requests, and were not presented before those earlier claims were resolved, see

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27 As the defendant's exhibits detail, the final, "amended," informal, federal tax refund claim from the plaintiffs in the record before the court is dated April 7, 1998.

Computervision Corp. v. United States, 445 F.3d at 1368-72; Mobil Corp. v. United States, 52 Fed. Cl. 327, 329 (2002), and (2) plaintiffs are collaterally estopped from asserting that they may amend their 1991-1998 refund claims, and their 1978-1980 claims are barred by res judicata.

The plaintiffs' alleged "amended" refund claims do not relate back to the previously filed informal claims

Under certain circumstances, "[t]he Internal Revenue Code permits an amendment to the original claim, even after the limitations period has expired." Mobil Corp. v. United States, 52 Fed. Cl. at 329. The defendant claims that "[p]laintiffs, however, cannot meet the legal requirements for such an amendment because their purported amendments were not made before the 1991-98 claims were resolved, and those purported amendments are not germane to the 1991-1998 claims." Specifically, defendant asserts that the plaintiffs' alleged 2006-2007 amendments came "well after the limitations period had passed," and the plaintiffs' amendments could only relate back to the 1991-1998 refund requests if the amendments "were made before the 1991-1998 [refund] requests were rejected or denied."

An amendment to a refund claim submitted after the expiration of the applicable statute of limitations may only be made if the original claim is still pending. See Computervision Corp. v. United States, 445 F.3d at 1372 (quoting Allstate Ins. Co. v. United States, 213 Ct. Cl. 96, 104, 550 F.2d 629, 633 (1977) ("It is a rule of long standing that once a refund claim has been disallowed, it is not subject to amendment.") (emphasis in original); Union Pac.

R.R. Co. v. United States, 182 Ct. Cl. 103, 116-17, 389 F.2d 437, 447 (1968) ("The disposition of a taxpayer's refund claim by allowance of the amount requested in full, however, precludes an amendment asserting an additional amount after the expiration of the statutory period for refund."). Absent such a principle, a taxpayer would be permitted to amend any refund claim in perpetuity. See Mut. Life Ins. Co. of N.Y. v. United States, 72 Ct. Cl. 204, 209, 49 F.2d 662, 664 (1931) ("A claim that has been rejected may not be amended after the statute of limitation has expired. To hold that a claim for refund made on a specific ground may, after it has been considered and rejected, be amended or enlarged so as to include an entirely different ground, and to claim a much larger refund than that asserted in the original claim, would be to permit an indefinite postponement of the limitation for bringing suit and would nullify the provisions of the statute as to the time within which claims may be filed and the time within which suit may be brought.") (citation omitted), cert. denied, 284 U.S. 628 (1931); Mobil Corp. v. United States, 52 Fed. Cl. at 336 ("[A]n amendment is allowed only if submitted before IRS has duly considered and resolved the original claim."); Wertz v. United States, 51 Fed. Cl. 443, 449 n.7 (2002). Plaintiffs filed a claim in the United States Tax Court on December 12, 1985, challenging the assessed interest, penalties, and balance of tax liabilities from 1978-1980. The issues presented included:

- whether respondent's (the IRS) use of the net worth method to reconstruct petitioners' income was warranted and appropriate;

- whether petitioners (the Larsons) understated their income for 1978, 1979 and 1980 and whether those understatements were due to fraud under 26 U.S.C. § 6653(b);
- whether the period for assessment for the years 1978, 1979 and 1980 had expired at the time the notice of deficiency was issued; and
- whether petitioners are entitled to use income averaging in computing the tax for 1978, 1979 and 1980.

Larson v. Comm'r, 1994 WL 285892, at *4-13. In its 1994 ruling, the United States Tax Court addressed each one of these claims, and found in favor of the government. Id. The court found "no evidence that refutes the net worth analysis." Id. at *10. "We find petitioners' actions constitute a pattern of activity designed to fraudulently avoid reporting and payment of their federal income tax for 1978, 1979 and 1980," id. at *12, and that the Larsons were estopped from denying fraud because "a tax evasion conviction . . . whether by trial or plea of guilty, estops the taxpayer from denying that the return for that year is fraudulent within the meaning of section 6653(b)." Id. The court also indicated that: "respondant's notice of deficiency is timely with respect to all 3 taxable years [1978, 1979, 1980]." Id. "Accordingly, we hold that petitioners have not carried their burden of showing their entitlement to income averaging." Id. at *13. Therefore, the September 16, 1985 Notice of Deficiency assessments for tax years 1978-1980 were upheld in 1994 by the Tax Court, and the plaintiffs are foreclosed from claiming that the 2006-2007 filings "amend" the previous informal refund filings, as the Tax Court's formal decision settled the issues claimed in the 2006-2007 filings.

Plaintiffs, undeterred in the wake of the Tax Court ruling, filed two more refund requests with the IRS, on July 10, 1994 and December 3, 1994, respectively, arguing that the government had improperly charged interest on the 1978-1980 tax year balances in violation of plaintiff Duane Larson's plea agreement. Duane Larson challenged the IRS rejections of his additional refund claims in the United States District Court for the Central District of California. Mr. Larson contended that he should not be liable for the statutory interest that accrued prior to August 19, 1985 on his tax liabilities for 1978, 1979 and 1980. Ruling for the United States, the District Court held:

> The plea agreement makes no reference to statutory interest. Likewise, the plain language of paragraph 13 of the plea agreement indicates that the government will not cease to pursue [plaintiffs] civil liabilities. The plea agreement, accordingly, related only to the criminal proceeding and did not bar additional civil assessments of tax, interest, and penalties . . . .[Plaintiff] had failed to offer any evidence, aside from self-serving statements of his subjective understanding of the plea agreement, that the Government had waived statutory interest in the plea agreement. The most objective means of evaluating the plea agreement are the actual terms of the agreement. Those

> terms overwhelmingly indicate that the plea agreement did not resolve, or purport to resolve, [plaintiff's] civil tax liabilities, including statutory interest.

Larson v. United States, No. 98-902, slip op. at 15-16 (C.D. Cal. 1999) (emphasis in original; brackets added). The District Court's findings were affirmed by the United States Court of Appeals for the Ninth Circuit on January 8, 2001. Duane W. Larson v. United States, 2 F. App'x 847 (9th Cir. 2001). Thus, as discussed above, a refund claim, informal or formal, cannot be amended or perfected after it has been denied or rejected, and after the period of limitations has expired. In the case before this court, the plaintiffs' current claims regarding the assessment of statutory interest have been foreclosed by the earlier 1998-2001 litigation.

Plaintiffs' amendments are not germane to the 1991 and 1998 refund requests

"The purpose of requiring the amended claim to be 'germane' to the original administrative claim is to 'prevent surprise and to give adequate notice to the [IRS] of the nature of the claim.'" Parker Hannifin Corp. v. United States, 71 Fed. Cl. 231, 235 (2006) (quoting Western Co. of N. Am. v. United States, 323 F.3d 1024, 1034 (Fed. Cir. 2003)) (brackets in original). The "germaneness" doctrine applies:

> where the taxpayer (1) files a formal claim within the limitations period making a specific claim; and (2) after the limitations period but, while the [IRS] still has jurisdiction over the claim, files a formal amendment raising

> a new legal theory–not specifically raised in the original claim that is "germane" to the original claim, that is, it depends upon facts that the IRS examined or should have examined within the statutory period while determining the merits of the original claim.

Computervision Corp. v. United States, 445 F.3d at 1370. As the United States Supreme Court explained:

> Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not mislead him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within [the IRS'] knowledge, or which, in the course of [the IRS] investigation [the IRS] would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.

United States v. Andrews, 302 U.S. 517, 524 (1938) (brackets added); see also Computervision Corp. v.

United States, 445 F.3d at 1370; Pink v. United States, 105 F.2d 183, 187 (2nd Cir. 1939) ("Whether a new ground of recovery may be introduced after the statute has run by amending a pending claim filed in time depends upon the facts which an investigation of the original claim would disclose. Where the facts upon which the amendment is based would necessarily have been ascertained by the [IRS] [C]ommissioner in determining the merits of the original claim, the amendment is proper.") (brackets added); Parker Hannifin Corp. v. United States, 71 Fed. Cl. at 234.

Without adherence to this principle of germaneness, a taxpayer might be permitted to amend any refund claim in perpetuity. Indeed, a Judge of this court has restated the practical application of only allowing claims "germane" to the original to proceed:

> To hold that a claim for refund made on a specific ground may, after it has been considered and rejected, be amended or enlarged so as to include an entirely different ground, would be to permit an indefinite postponement of the statute of limitation for bringing suit and would nullify the provisions of the statute.

Mobil Corp. v. United States, 52 Fed. Cl. at 336 (quoting Mut. Life Ins. Co. of N.Y. v. United States, 72 Ct. Cl. at 209, 49 F.2d at 664).

Defendant argues that none of the plaintiffs' 2006 and 2007 refund claims are germane to the multiple refund claims plaintiffs originally filed between 1991 and 1998, as each of the original refund claims "alleged specific grounds for relief."

Defendant alleges that the grounds upon which the 2006 and 2007 refund claims lie are specific, and distinct from the previous refund claims. Defendant described plaintiffs' original 1991-1998 grounds requesting relief from both the courts and the IRS as including the following:

- the jeopardy assessments were made outside the relevant statute of limitations;
- the IRS improperly utilized the net worth method to reconstitute plaintiffs' income;
- plaintiffs did not understate their income due to fraud or negligence;
- plaintiffs were entitled to use income averaging; and
- the IRS wrongfully collected interest accrued prior to August 15, 1985 in violation of Mr. Larson's plea agreement.

(citations omitted). Whereas, the plaintiffs' alleged different grounds in the 2006-2007 refund claims, including:

- the IRS over collected (and double collected) amounts due in tax years 1978-1980;
- the IRS, in violation of 26 U.S.C. § 6213(a), improperly collected the amounts while the Tax Court action was still pending;
- interest could not properly be charged on fraud penalties assessed in years 1978-1980; and Mr. Larson's social security account was not properly credited for taxes paid.

(citation omitted).

The distinction between the plaintiffs' original and amended claims is apparent even after a cursory analysis. In plaintiffs' original refund claims, submitted between 1991 and 1998, plaintiffs primarily argue about how the allegedly improper taxes and penalties had been calculated, whether plaintiffs were outside the statue of limitations for filing new claims, and the impact of plaintiff Duane Larson's criminal conviction on the calculation. For instance, plaintiffs' arguments include allegations that the IRS used improper methods of calculating the plaintiffs' 1978-1980 taxes (i.e., "net worth" as opposed to "income averaging"), and that the IRS improperly added fraud and interest penalties to plaintiffs' tax deficiencies (i.e., the plaintiffs did not understate their 1979-1980 income and interest was assessed prior to the plea agreement). As the Tax Court did not affirm the IRS' calculations of plaintiffs' tax obligation until June 1994, it would be illogical for the IRS to investigate collection or crediting of additional amounts due at the time plaintiffs submitted their first refund claims in November 1991 and January 1992.

In the "amended" claims submitted in 2006-2007, however, the plaintiffs argue against the methods by which the allegedly, improper tax liabilities had been collected. Indeed, the plaintiffs argue that the IRS improperly, "excessively double assessed" penalties, including for fraud, failed to properly credit to Social Security the amounts they had paid, and collected the 1978-1980 liabilities while the Tax Court proceedings were still open, ostensibly in violation of 26 U.S.C. § 6213.

Plaintiffs also argue that there was an additional investigation performed by the IRS as a result of plaintiffs' August 9, 2002 Form 1040X amended refund request submitted to the IRS for the 1979 tax year. Defendant argues that this opening of an inquiry by the IRS was a mistake, as "[t]he IRS . . . [was] unaware of the prior litigation involving 1978-1980," when commencing this review of the plaintiffs' amended return. Nonetheless, that review resulted in several adjustments to plaintiffs' accounts and subsequently two refunds to the plaintiffs in the amount of $78,672.16 for tax year 1978, "that was later adjudicated as untimely," and another $31,770.01, also for tax year 1978, "that was barred by both res judicata and the applicable statute of limitations." In its brief in support of its motion to dismiss, defendant indicates that, "should any of plaintiffs' claims survive this motion to dismiss, defendant intends to file a counterclaim for the $31,770.01 and to seek a setoff ofthe $78,672.16." Therefore, the court concludes that because the plaintiffs' original claims filed between 1991 and 1998 cover the methods and calculations of the IRS, these 1991-1998 claims are not germane to the 2006-2007 claims submitted by the plaintiffs, and must be rejected by this court.

The doctrine of collateral estoppel and res judicata bar plaintiffs from reasserting their claims regarding 1978, 1979 and 1980 tax years

In the alternative, the defendant also raises the doctrine of res judicata as barring plaintiffs' claims related to their federal income taxes for tax years 1978-1980. The United States Supreme Court summarized the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) as follows:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res

judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." Southern Pacific R. Co. v. United States, 168 U.S. 1, 48-49 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Cromwell v. County of Sac, 94 U.S. 351, 352 (1877); Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955); 1B J. Moore, Federal Practice ¶ 0.405[1], pp. 621-624 (2d ed. 1974) (hereinafter 1B Moore); Restatement (Second) of Judgments § 47 (Tent. Draft No. 1, Mar. 28, 1973) (merger); id., § 48 (bar). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2-3 (1942); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion). Application of both doctrines is central to the purpose for which civil courts have been

> established, the conclusive resolution of disputes within their jurisdictions. Southern Pacific R. Co., supra, at 49; Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States, 440 U.S. at 153-54 (footnote omitted).

The United States Court of Appeals for the Federal Circuit has established that "a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action." Int'l Air Response v. United States, 302 F.3d 1363, 1368 (Fed. Cir. 2002) (citing Federated Dep't Stores, Inc. v. Moitie, 452 U.S. at 398), reh'g denied, 324 F.3d 1376 (Fed. Cir.), reh'g en banc denied, 324 F.3d 1380 (Fed. Cir. 2003); see also In re Deckler, 977 F.2d 1449, 1452 (Fed. Cir.), reh'g denied and en banc suggestion declined (Fed. Cir. 1992). According to the United States Supreme Court, application of the doctrine of collateral estoppel "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." Montana v. United States, 440 U.S. at 153 (citing S. Pac. R.R. Co. v. United States, 168

U.S. at 49). By affording a claimant only one opportunity to obtain redress, the doctrine conserves judicial resources, fosters reliance upon judicial decisions, and protects litigants from vexatious and needless litigation. See Martin v. United States, 30 Fed. Cl. 542, 546, aff'd, 41 F.3d 1519 (Fed. Cir. 1994) (table); Lins v. United States, 4 Cl. Ct. 772, 777, aff'd, 758 F.2d 666 (Fed. Cir. 1984) (table). Collateral estoppel serves the dual purpose of "protect[ing] litigants from the burden of relitigating an identical issue and promot[ing] judicial economy by preventing needless litigation." Morgan v. Dep't of Energy, 424 F.3d 1271, 1274 (Fed. Cir. 2005) (citing Arkla, Inc. v. United States, 37 F.3d 621, 624 (Fed. Cir. 1994)) (brackets added).

The United States Court of Appeals for the Federal Circuit, following the precedent set by the United States Supreme Court, also discussed issue preclusion and claim preclusion, writing that, "[u]nlike issue preclusion, which only bars matters actually litigated in a prior proceeding, claim preclusion forecloses matters that, although never litigated or even raised, could have been advanced in an earlier suit." Carson v. Dep't of Energy, 398 F.3d 1369, 1375, n.8 (Fed. Cir.), reh'g denied (Fed. Cir. 2005). The Federal Circuit, in further discussing the doctrine of res judicata, or claim preclusion, specified that "res judicata applies if (1) the prior decision was rendered by a forum with competent jurisdiction; (2) the prior decision was a final decision on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases." Id. At 1375; see also Acumed LLC v. Stryker Corp., 525 F.3d 1319, 1323 (Fed. Cir.), cert. denied, 129 S.

Ct. 24 (2008) ("Under the doctrine of claim preclusion, 'a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.'" (quoting Parklane Hosiery Co. v. Shore, 439 U.S. at 327 n.5)) (footnote omitted); Jet, Inc. v. Sewage Aeration Sys., 223 F.3d 1360, 1362 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2000); Int'l Nutrition Co. v. Horphag Research, Ltd., 220 F.3d 1325, 1328 (Fed. Cir. 2000) (defining the third element as involving "the same claims that were raised, or could have been raised, in the prior action."); Schickler v. United States, 54 Fed. Cl. 264, 270 (2002), appeal dismissed, 70 F. App'x 584 (Fed. Cir. 2003) (citing Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 323-24 (1971)). Further clarifying the third requirement in terms of claim preclusion, the Federal Circuit wrote:

> A subsequent suit is barred if it arises out of the same subject matter as a previous suit and which, "through the exercise of diligence, could have been litigated in a prior suit." [Restatement (Second) of Judgments § 24 (1982).] What constitutes the subject matter of a suit depends on the factual basis of the complaint, and any cause of action that arises out of the same facts should be litigated in the same action. See id. at 630; see also Flores v. Edinburg Consol. Independent School Dist., 741 F.2d 773, 777 (5th Cir. 1984), reh'g denied, 747 F.2d 1465 (1984) (table).

United Techs. Corp. v. Chromalloy Gas Turbine Corp., 189 F.3d 1338, 1344 (Fed. Cir.), reh'g denied (Fed. Cir.), en banc suggestion declined (Fed. Cir. 1999).

Plaintiffs are precluded from asserting that they may amend their informal and formal refund claims filed between 1991 and 1998 for tax years 1978, 1979 and 1980

Under the doctrine of issue preclusion, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982); see also Tex. Instruments Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558, 1568 (Fed. Cir.) (citing Restatement (Second) of Judgments § 27 in the same context), reh'g denied, en banc suggestion declined (Fed. Cir. 1996), cert. denied, 520 U.S. 1228 (1997). Issue preclusion is the modern term for both direct and collateral estoppel. 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4416 at 386 (2d ed. 2002). The doctrine of issue preclusion:

> is available whether or not the second action involves a new claim or cause of action. If the second action involves the same claim or cause of action as the first, issue preclusion may be called direct estoppel. If a new claim or cause of action is involved, issue preclusion is commonly called collateral estoppel.

Id. at 393.

The United States Court of Appeals for the Federal Circuit specifies that a party asking the court to apply collateral estoppel must establish that:

> (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been "a critical and necessary part" of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Dana v. E.S. Originals, Inc., 342 F.3d 1320, 1323 (Fed. Cir. 2003) (quoting Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998)); see also In re Trans Tex. Holdings Corp., 498 F.3d 1290, 1297 (Fed. Cir. 2007) (quoting Jet, Inc. v. Sewage Aeration Sys., 223 F.3d at 1365-66); Shell Petroleum, Inc. v. United States, 319 F.3d 1334, 1338 (Fed. Cir.), reh'g and reh'g en banc denied (Fed Cir.), cert. denied, 540 U.S. 1046 (2003); Restatement (Second) of Judgments §§ 27, 39 (1982).

(a) Identical issues

The following guidelines, articulated by the United States Supreme Court, albeit lengthy, should be instructive to the Larsons to help them understand why their tax claims are precluded from further, repetitive litigation:

> It is first necessary to understand something of the recognized

meaning and scope of res judicata, a doctrine judicial in origin. The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

But where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or nonliability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit. Collateral estoppels operates, in other words, to relieve the government and the taxpayer of "redundant litigation of the identical question of the statute's application to the taxpayer's status." But collateral estoppel is a doctrine capable of being applied so as to avoid an undue disparity in the impact of income tax liability. A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. Such consequences, however, areneither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that havebecome obsolete or erroneous with time, thereby causing inequities among taxpayers. And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation. And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive. . . . [A] judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppels inapplicable. . . . It naturally follows that an interposed alternation in the pertinent statutory provisions or Treasury regulations can make the use of the rule unwarranted. Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding event even though the cause of action is different. And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency in decision is considered just and desirable, reliance maybe placed upon the ordinary rule of stare decisis. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve

> the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.

Comm'r v. Sunnen, 333 U.S. 591, 597-602 (1948) (footnotes and citations omitted).

In this case, although there is a gap in time between the multiple combinations of formal and informal refund claims submitted to the IRS by the plaintiffs, as documented in the submissions to the IRS and the cases filed by the plaintiffs between 1991-1999, multiple times in 2002, and between 2006 to 2007, the underlying issues have remained the same. The issues repeatedly raised concern the finality of the decisions of the ruling with respect to plaintiffs' 1978, 1979 and 1980 tax liability, including interest and penalties and the impermissibility of plaintiffs' untimely, attempted, amendments and claims to their 1978, 1979 and 1980 tax returns for those allegedly, illegally assessed taxes, penalties, and interest. The following is a summary of court actions filed by plaintiffs and court decisions on the issues raised, beginning with the United States Tax Court:

- **"The Tax Court action"**
  - Larson v. Comm'r, 67 T.C.M. (CCH) 3154 (1994), aff'd, 60 F.3d 830 (8th Cir. 1995) (table).
- **"The 1997 filed action"**
  - Larson v. United States, No. 97-782 (C.D. Cal. 1998) (filed October 3, 1997) (alleged violation of plea agreement regarding assessed pre- August 19, 1985 interest).

□ Court dismissed (without prejudice) for lack of subject matter jurisdiction for failure to file an administrative claim with the IRS for the full amount prior to filing suit on March 31, 1998.

• **"The 1998 filed action"**

o Larson v. United States, No. 98-902 (C.D. Cal. 1999) (filed October 21, 1998; dismissed November 29, 1999, with prejudice, for lack of subject matter jurisdiction).

o aff'd, Larson v. United States, 2 F. App'x 847 (9th Cir. 2001) (No. 00-55185) (for the reasons stated in the District Court's opinion).

□ The District Court dismissed, with prejudice, plaintiff Duane Larson's contention that he is not liable for the interest accrued prior to August 19, 1985. Moreover, the court found that plaintiff was not entitled to any refund because the tax liability had been fully paid.

• **"The two actions filed in 2004"**

o Larson v. United States, No. 04-939 (C.D. Cal. 2006) (filed July 9, 2004; decided April 18, 2006) (plaintiffs alleged improper jeopardy assessments and monies taken from other tax years without plaintiffs' knowledge).

o Larson v. United States, No. 04-1176 (C.D. Cal. 2005) (filed October 7, 2004, decided May 4, 2005) (this case, also for refund of excess taxes for 1978, 1979 and 1980, was found by the court to be similar to case nos. 97-782 and 98-902).

□ In case no. 04-1176, plaintiffs alleged that the IRS could not impose jeopardy assessments after the Tax Court decision.

□ In the same case, plaintiffs also alleged that the IRS had caused "double" collections to be made because IRS records did not properly reflect payments by Mr. Larson.

□ The court concluded that the decision reached in case no. 98-902 had previously dismissed all of the plaintiffs' claims for the 1978, 1979 and 1980 tax years.

□ The two cases were dismissed by the District Court with prejudice for the same reasons, given their nearly identical complaints for the same tax, and reliance on the same facts.

□ aff'd, Larson v. United States, 175 F. App'x 814 (9th Cir. 2006) (Nos. 05-55789, 05-55892). As both of these actions were found to be "identical," they were combined in the appeal to the Ninth Circuit Court of Appeals. The Ninth Circuit, again, clearly articulated in its 2006 opinion that "[b]ecause the Larsons did not file their administrative claim for a tax refund within two years of paying the tax, the administrative claim was untimely under 26 U.S.C. § 6511(a) and 26 C.F.R. § 301.6511(a)-1(a)(2)." Larson v. United States, 175 F. App'x 814, 2006 WL 897435, at *1 (9th Cir. Mar. 8, 2006). "The district court therefore lacked subject matter jurisdiction over the Larsons' tax refund action. See 26 U.S.C. § 7422(a)." Id. (citations omitted).

(b) Actually litigated

For an issue to be precluded in a subsequent action, in addition to being identical, it must have been "actually litigated and determined in the original action . . . . Only upon such matters is the judgment conclusive in another action." Cromwell v. County of Sac, 94 U.S. at 353. An issue is "actually litigated" when it is: 1) appropriately raised, by the pleadings or otherwise; 2) submitted for determination; and 3) determined by the court. See Restatement (Second) of Judgments § 27, comment d (1982); Banner v. United States, 238 F.3d 1348, 1354 (Fed. Cir. 2001) (holding that, despite plaintiffs assertions to the contrary, the relevant issues were "actually litigated," because they were raised by the pleadings, submitted for determination, and actually decided by the court); Shell Petroleum, Inc. v. United States, 319 F.3d at 1339. Moreover, "[c]ollateral estoppel will bar the relitigation of any matters in a second proceeding concerning a second taxable year that were actually presented and determined in the first suit." Furst v. United States, 230 Ct. Cl. 375, 385, 678 F.2d 147, 154 (1982) (citing Comm'r v. Sunnen, 333 U.S. at 598). In the instant case, both parties have had ample opportunity to address the issues in their briefs in the Tax Court, various District Courts and Federal Circuit Courts on appeal. For the most part, plaintiffs' filings currently before this court proffer essentially the arguments previously urged, albeit phrased differently.

Plaintiffs also argue that when the District Court dismissed for lack of subject matter jurisdiction over the plaintiffs' claims, any findings made by the court are "void and of no effect." Plaintiffs, however, misunderstand the impact of the dismissals of their claims, which were based on the facts of the claims presented for the 1978, 1979 and 1980 tax years and on the preclusive nature of the earlier decisions on the same subject. Because previous courts, including the United States Tax Court, the United States District Court for the Central District of California and the United States Courts of Appeal for the Eighth and Ninth Circuits, have found the IRS assessments, including penalties and interest, to be valid, and the time for plaintiffs to have filed administrative claims challenging those assessments, penalties, and interest has passed, plaintiffs' claims are precluded from relitigation in the instant action.

(c) Necessary to judgment

The third factor of the issue preclusion test is that the issues in question in the current lawsuit must have been necessary to the judgment in the original proceeding. See In re Trans Tex. Holdings Corp., 498 F.3d at 1297. According to the United States Court of Appeals for the Federal Circuit, "the purpose of the ['necessary to the judgment'] requirement is to prevent the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." Mothers Rest., Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1571 (Fed. Cir 1983). Relitigation of an issue of fact or law in a suit based on a different cause of action may be precluded if the court decides that the issue was necessary to the resulting judgment in the first action. Allen v. McCurry, 449 U.S. 90, 94 (1980) (citing Montana v. United States, 440 U.S. at 153); see also San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 336 n.16 (2005).

The plaintiffs assert that their claims are not precluded because the Ninth Circuit did not write anything at all about plaintiffs' earlier, filed refund requests, for which reason plaintiffs argue the court's judgment did not address or resolve any of them. Plaintiffs also assert that the claims were never expressly rejected by the IRS Commissioner.

As stated by the plaintiffs, "[t]he IRS has never answered, considered, or resolved any of Larson's refund claims," therefore never expressly rejecting them. (emphasis in original). The defendant argues, however, that "[t]he issue squarely placed before [the Ninth Circuit Court of Appeals in case nos. 05-55789 and 05-55892] was whether the claims for refund at issue could properly be considered amendments to the alleged earlier-filed claims for refund." There is no need for the IRS or the courts to explicitly respond to each one of the plaintiffs' earlier-filed refund claims or issues raised, if the IRS or the particular court, after review of the parties' submissions, concludes that the IRS taxes, penalty, and interest assessments are valid and proper, and the court has ruled on plaintiffs' claims as presented to them. In the case of plaintiffs' refund claims in this court, each of the federal courts, after review, found plaintiffs' claims to be without merit.

(d) Full and fair opportunity to litigate

The last requirement for an issue preclusion analysis is that "the party defending against preclusion had a full and fair opportunity to litigate the issues" in an earlier action or in these case actions. Ammex, Inc. v. United States, 384 F.3d 1368, 1371 (Fed. Cir. 2004), cert. denied, 544 U.S. 948 (2005); see also Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. at 333 (holding that the person against whom issue preclusion is asserted should be allowed to demonstrate "that he did not have 'a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time'" (quoting Eisel v. Columbia Packing Co., 181 F. Supp.

298, 301 (D. Mass. 1960))); Masco Corp. v. United States, 303 F.3d 1316, 1329 (Fed. Cir. 2002).

When determining whether a party was given a full and fair opportunity to litigate the relevant issues, factors to be considered include: "(1) whether there were significant procedural limitations in the prior proceeding, (2) whether the party had an incentive to litigate fully the issue, and (3) whether effective litigation was limited by the nature or relationship of the parties." Banner v. United States, 238 F.3d at 1354; see also Shell Petroleum, Inc. v. United States, 319 F.3d at 1340 (holding that the "full and fair opportunity to litigate" requirement was met because the plaintiff was fully represented by counsel, had a monetary incentive to litigate, and effective litigation was not hindered in any way). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. at 153-54.

The plaintiffs have been afforded multiple, sufficient, full and fair opportunities to litigate their federal income tax refund issues. There is no evidence in the record that the plaintiffs were not afforded opportunities to fully litigate the issues raised in the courts or with the IRS. Nor have the plaintiffs raised an instance of procedural limitations imposed upon the plaintiffs with respect to prior tax actions. Although the plaintiffs have been attempting to reassert their refund claims for tax years 1978, 1979 and 1980 for a long period of time, and repeatedly, there is no evidence that plaintiffs' litigation of their issues in the 1998 or 2004 actions were hindered by either the nature or the relationship of the parties. The legal and factual issues raised by the plaintiffs' claims for refunds for tax years 1978-1980 have been fully litigated, and repeatedly decided against the plaintiffs.

Plaintiffs' decision to proceed pro se is one of their own choosing, rather than a result of external pressures. The court also notes that plaintiff Duane Larson is a law school graduate, albeit, apparently, not a member of the bar. Based on the record before the court, including the decisions by earlier federal courts, the number of the briefs filed by both sides in those courts, and in this court, it is clear that plaintiffs already have had full and fair opportunity to have their claims heard in the trial courts and again during review of those claims upon appeal. To allow plaintiffs to relitigate the same issues in this instant action would not be in the interests of judicial economy and would be inconsistent with existing case precedent.

The plaintiffs' refund claims for tax years 1978, 1979 and 1980 are also barred by the doctrine of res judicata

As indicated above, "res judicata applies if (1) the prior decision was rendered by a forum with competent jurisdiction; (2) the prior decision was a final decision on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases." Carson v. Dep't of Energy, 398 F.3d at 1375.

The prior suit was final on the merits

"[I]f a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year." Comm'r v. Sunnen, 333 U.S. at 598. As previously noted, plaintiffs' claims for the 1978, 1979 and 1980 tax years have received comprehensive review and are the subject of conclusive judgments on the merits by multiple courts. The plaintiffs disagree, however, and argue that:

> Any refund claim cases following Case # 98-902 that rely upon 26 USC6511(a) and 26 USC 7422(a) for **subject matter jurisdiction**, and that involve the same tax years are NOT barred by Res Judicata because there was no "final judgment on the merits" in Case # 98-902 regarding refunds based on 26 USC 6511(a) and 26 USC 7422(a), because the Court lacked [sic] expressly refused to address the government's subject matter jurisdiction argument for all 3 tax years in Case # 98-902.

(emphasis in original).

Plaintiffs have previously had numerous bites at the apple in a variety of courts. Defendant also points out that of the four counts presented in United States District Court case no. 98-902:[28]

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[28] In the 1998 action, plaintiff asserted individual claims for: (1) a declaratory judgment; (2) & (3) two separate claims for breach of a plea agreement; and (4) for "a refund per 28 USC 1346(a), or per 26 USC 6511 and 7422, of all improperly assessed and collected pre8-19-85 interest . . . ."

> The Government, defendant in that action, sought to dismiss only Mr. Larson's declaratory judgment claim. [The Government] never sought to dismiss the Mr. Larson's refund claim for lack of subject matter jurisdiction. Rather, [the Government] sought summary judgment on all of the remaining claims on the grounds that the plea agreement did not prevent defendant from collecting "pre 8-19-85 interest" and argued, in the alternative, that plaintiffs' refund claim must be capped, pursuant to § 6511(b), to amounts paid within the two-year period immediately following plaintiffs' refund claims.

(brackets added). Defendant's assertions regarding the District Court action in case no. 98-902 are corroborated by the language used in the judgment. Specifically, the District Court determined:

> 1. Judgment shall be entered dismissing, with prejudice, petitioner Larson's cause of action for declaratory relief, for lack of subject matter jurisdiction.
> 2. Summary judgment shall be entered in favor of the United States, and against petitioner Larson, as to the remaining causes of action of his petition and complaint.
> 3. Petitioner Larson shall take nothing by way of his petition and complaint,

> and his action shall be dismissed, with prejudice.

Larson v. Comm'r, No. 98-902, slip op. at 25-26 (C.D. Cal. 1999).

Despite the evidence of this conclusive language, plaintiffs argue that the "crossed out" language in the District Court's "Statement of Uncontroverted Facts and Conclusions of Law" represented proof that "the court refused to rule on the refund request subject matter jurisdiction raised by respondent when he argued 26 USC 6511(a) and 26 USC 7422(a) provided the [District] court with subject matter jurisdiction through Larson's refund request dated 4-7-98." (emphasis omitted). It is correct that the signed, District Court Judge's Order is a copy of a submission from the government with sentences and phrases crossed out as deletions and added language interlineated. However, the portions quoted immediately above were not crossed out, and the Order entered in the District Court's docket on November 29, 1995 was endorsed with the Judge's signature and the date entered of November 24, 1999.

Moreover, the same District Court Judge, in case no. 98-902, also entered another Order on the same date, which stated:

> There is no genuine issue of material fact as to whether the petitioner is entitled to the refund of statutory interest he paid on his 1978, 1979, and 1980 Federal income tax liabilities which accrued prior to [the] August 19, 1985 [date of Duane Larson's plea agreement].

> Summary judgment accordingly shall be entered in favor of respondent, the United States of America, and against petitioner Duane W. Larson *as* to the remaining causes of action of his Petition and Complaint filed in this action.

Larson v. United States, No. 98-902, slip op. at 25 (C.D. Cal. 1999) (brackets added). Plaintiffs' assertion that the District Court judgment in case no. 98-902 did not reach the question of whether the refund claims were valid under 26 U.S.C. § 6511(a) and 26 U.S.C. § 7422(a) cannot survive the weight of contradictory evidence that these claims were adjudicated in that action, and the decision was affirmed by the Ninth Circuit Court of Appeals. See Larson v. United States, 2 F. App'x 847.

The same cause of action and the same parties or their privies were involved in both cases

Duane Larson has been involved in all of the actions previously mentioned, including the actions filed in the United States District Court in 2004, case nos. 04-939 and 04-1176, and the combined appeal there from. Moreover, the cases all concern the jointly filed and signed income tax returns for plaintiffs Duane and Pamela Larson. In the dispositive 2004 lawsuits and subsequent appeals to the Ninth Circuit Court of Appeals, Duane and Pamela Larson were both plaintiffs. As noted, the facts and issues raised by the current complaint for refunds related to tax years 1978-1980 have been adjudicated multiple times prior to this instant action.

Plaintiffs' argument in the instant action, that there are excess amounts of tax liabilities illegally collected from the plaintiffs with respect to years 1978-1980, is entirely reminiscent of arguments proffered by the plaintiffs in the 1998 and 2004 District Court actions. The District Court Judge who presided in both actions filed in 1998 and 2004, noted in her 2005 opinion in case no. 04-1176:

> The Larsons seek to obtain a refund of taxes that were collected pursuant to a November 23, 1994 jeopardy assessment that they contend was in excess of the Tax Court's decision in 1994. This "excess amount" is the same overpayment that Mr. Larson sought to recover in the 1998 Action. As the Court reached a decision on the merits in the 1998 Action and dismissed all of Mr. Larson's claims for overpayment arising from the same subject tax years, plaintiff's claims in this matter are barred by the doctrine of *res judicata* irrespective of Mr. Larson's ability to devise creative new theories of recovery.

Larson v. United States, No. 04-1176, slip op. at 4 (C.D. Cal. 2005). None of the "creative new theories of recovery" resonated with the District Court Judge. Id. Thus, with respect to the application of the doctrine of res judicata to plaintiffs' claims, that doctrine already has been applied, and its application affirmed with respect to plaintiffs' tax claims for the 1978, 1979 and 1980 tax years.

The identity of the transactional facts underlying each action also would bar plaintiffs' current actions under the doctrine of res judicata. The transactional approach to res judicata is detailed in the Restatement (Second) of Judgments:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . ., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24 (1982). The United States Court of Appeals for the Federal Circuit has followed the transactional approach in applying the doctrine of res judicata. See, e.g., Acumed LLC v. Stryker Corp., 525 F.3d at 1323 ("In applying the doctrine of [claim] preclusion,29 this court is guided by the Restatement (Second) of Judgments." (citing Foster v. Hallco Mfg. Co., 947 F.2d 469, 477 n.7, 478-79 (Fed. Cir. 1991)). "Accordingly, the court looks at the underlying cluster of factual circumstances to answer the question whether the issues raised, and relief sought before this court, could have been raised in the prior litigation." Tindle v. United States, 56 Fed. Cl. 337, 346-47 (2003).

As a Judge of this court noted in Smith v. United

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29 The United States Court of Appeals for the Federal Circuit in Acumed explained the changing terminology of res judicata and collateral estoppel:

> In the interest of precision, courts often use the term "claim preclusion" in place of the more general term "res judicata." See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984); Foster v. Hallco Mfg. Co., Inc., 947 F.2d 469, 478 (Fed. Cir. 1991) (hereinafter " Foster "). Although the term resjudicata was once used primarily to denote the concept of claim preclusion, usage of the term res judicata has evolved to include "any preclusion of litigation arising from a judgment, including collateral estoppel." Foster, 947 F.2d at 478. Thus, to maintain the analytical distinction between res judicata and collateral estoppel, courts often substitute the terms "claim preclusion" and "issue preclusion." Id.; See generally Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982) (discussing the terminology of res judicata); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4402 (2d ed. 2002) (same).

Acumed LLC v. Stryker Corp., 525 F.3d at 1323 n.2.

States:

> Plaintiff's instant claim is one for money damages . ....for the period between his court-martial and the date he otherwise would have been discharged. Although such a claim differs in its request for monetary relief from his earlier claim for habeas relief, it would appear that the core or nucleus of operative facts on which both claims are founded are the same or very nearly the same, i.e., whether the presiding military judge was a member in good standing of his state bar, pursuant to 10 U.S.C. 826(b).

Smith v. United States, 59 Fed. Cl. 64, 67 (2003), aff'd, 117 F. App'x 95 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2004); see also Nevada v. United States, 463 U.S. 110, 130 (determining that courts must first determine whether the "same cause of action" is the basis for the subsequent lawsuit), reh'g denied, 464 U.S. 875 (1983).

The Larson plaintiffs have attempted to repackage their theory of refund recovery a number of times, but the underlying "transactional" facts regarding their 1978, 1979 and 1980 tax liability have remained the same. In short, the plaintiffs seek a refund from payments made on their 1978-1980 tax liability. "Altering the theory of recovery does not create a new claim under the transactional approach." Tindle v. United States, 56 Fed. Cl. at 347. Therefore, although the plaintiffs argue that their most recent action in this court is distinguishable from their previous federal court lawsuits, the plaintiffs' instant action once again challenges their tax liability for the 1978-1980 tax years. The cases all share a common, fundamental issue: whether plaintiffs may amend their earlier-filed refund requests for tax years 1978-1980. Plaintiffs' redundant, refund claims for tax years 1978-1980 display an "[a]bsen[ce] [of] significant changes in controlling fact or legal principles . . . ." Montana v. United States, 440 U.S. at 157 (brackets added). Therefore, the plaintiffs' instant complaint should be barred by the doctrine of res judicata.

Plaintiffs' contentions that exceptions to res judicata apply in this case also fail

While it is generally true that res judicata principles are applied in accord with the commitment of doing justice, and thus circumstances can dictate exceptions, it is also true that the exceptions are narrow. See Bingaman v. Dep't of Treasury, 127 F.3d 1431, 1437 (Fed. Cir. 1997). Courts may permit exceptions to preclusion upon an occurrence of a change in the law after the initial judgment or, in some circumstances, upon the discovery of new facts that are materially relevant to the claim or issue. See Lockheed Aircraft Corp. v. United States, 192 Ct. Cl. 36, 43, 426 F.2d 322, 326 (1970); Saladino v. United States, 62 Fed. Cl. 782, 792 (2004). Courts, however, "rarely" have accepted the existence of "new" evidence to combat the preclusive effect of res judicata and "only when a diligent plaintiff could not have discovered the facts in an earlier action." Saladino v. United States, 62 Fed. Cl. at 792.

Plaintiffs' claim of an exception to res judicata is that "new" evidence consisting of plaintiffs' allegedly, timely filed, January 29, 1992, Form

1040X Amended Income Tax Return for tax years 1978-1980 had been the subject of "intentional concealment" by the IRS. Plaintiffs allege that the IRS had intentionally "misrepresented" the existence of the Form 1040X and, thus, it was not available for the District Court actions. Despite the plaintiffs' contentions, they provide, perhaps unwittingly, evidence to contradict their own assertions. As the defendant points out, the plaintiffs sent at least four letters to the IRS seeking acknowledgement that it had received the January 29, 1992 Form 1040X. The IRS sent plaintiffs a letter dated July 28, 1992, advising plaintiffs:

> that it is not routine practice for IRS to acknowledge receipt of income tax returns, original or amended. Despite the forgoing, . . .we have associated with the legal file of your Tax Court case, . . . in which taxable years 1978, 1979 and 1980 are at issue, your correspondences dated November 5, 1991,December 7, 1991, January 29, 1992, March 26, 1992, April 27, 1992, and July 1, 1992, together with various enclosures . . . , including Forms 1040X for1978, 1979 and 1980 all of which are dated January 29, 1992.

The fact that the IRS acknowledged in writing that it had received the plaintiffs' Forms 1040X and letters invalidates plaintiffs' allegations that the IRS "concealed" the existence of the forms, or that these forms represent "new" evidence.30 Moreover, in actions subsequent to January 2002, the plaintiffs could have raised evidence as to any such Form 1040X and, by their current claim of concealment by the IRS, apparently chose not to do so.

Plaintiffs fail to state a claim for relief from statutory interest previously paid on income tax fraud penalties

Count VIII of the plaintiffs' complaint seeks restitution from the IRS "for a sum equal to the total interest the IRS charged Larson on his fraud penalties for tax years 1978, 1979, and 1980, together with statutory interest on that interest per 26 U.S.C. 6621."Essentially, it appears that plaintiffs argue that neither 26 U.S.C. § 6653 nor 26 U.S.C. § 6601(e)(2) allows for interest to accrue upon the section 6653 fraud penalties.

The plaintiffs assert that "IRS Notice 746," which states: "we charge interest on fraud and negligence penalties if the tax returns, including extensions, are due after December 31, 1988," nullifies the application of statutory interest to section 6653 fraud penalties, as "Larson's tax returns for tax years 78-80 were due on 4-15-1981."31 Plaintiffs also attempt in their brief to

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30 The court notes that actions by government officials of intentional concealment or misrepresentation" are allegations of tortious conduct, which is outside the jurisdiction of this court. See, e.g., Keene Corp. v. United States, 508 U.S. at 214; Rick's Mushroom Service, Inc. v. United States, 521 F.3d at 1343.

31 The plaintiffs provide no documentation as to why April 15, 1981 is the alleged "due date" for the 1978, 1979 and 1980 tax years.

demonstrate that the legislative history of sections 6653 and 6601 support their argument that interest should not have been charged on these fraud penalties:

> There is a reason Notice 746 states there is no interest on fraud penalties unless the tax return was due after 12-31-1988 and that reason is found at 26 USC 6601(e)(2)(A). It is because 26 USC 6653(b) (fraud penalty) was not added to 26 USC 6601(e)(2)(A) until 1988.

A parsing of the legislative history of 26 U.S.C. § 6653 reveals that as early as 1982 Congress had amended section 6653 to include language pertaining to interest:

> o (b) Fraud.--
>
> ☐ (1) In general.- If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment.
>
> ☐ (2) Additional amount for portion attributable to fraud.- There shall be added to the tax (in addition to the amount determined under paragraph (1)) an amount equal to 50 percent of the interest payable under section 6601—
>
> • (A) with respect to the portion of the underpayment described in paragraph (1) which is attributable to fraud, and
>
> • (B) for the period beginning on the last day prescribed by law for payment

> of such underpayment (determined without regard to any extension) and ending on the date of the assessment of the tax (or, if earlier, the date of the payment of the tax).
>
> □ (3) No negligence addition when there is addition for fraud.- The addition to tax under this subsection shall be in lieu of any amount determined under subsection (a).
>
> □ (4) Special rule for joint returns.- In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of the spouse unless some part of the underpayment is due to the fraud
> of such spouse.

Pub. L. 97-248, § 325(a), Sept. 3, 1982. The effective date of this Public Law was established as follows: "The amendment made by subsection (a) . . . shall apply with respect to taxes the last day prescribed by law for payment of which (determined without regard to any extension) is after the date of enactment of this Act." Id.

As of a 1989 amendment, section 6653 currently reads:

> Any person (as defined in section 6671(b)) who--
>
> (1) willfully fails to pay any tax imposed by this title which is payable by stamp, coupons, tickets, books, or other devices or methods prescribed by this title or by regulations under the authority of this title, or

> (2) willfully attempts in any manner to evade or defeat any such tax or the payment thereof,
>
> shall, in addition to other penalties provided by law, be liable for a penalty of 50 percent of the total amount of the underpayment of the tax.
>
> 26 U.S.C.A. § 6653 (as amended, Pub. L. 101-239, § 7721(c)(1), Dec. 19, 1989).

The plaintiffs also rely on the language in section 6601(e). Section 6601(e)(2) was amended in 1986 to include the following:

> (2) Interest on penalties, additional amounts, or additions to the tax--
>
> □ (A) Interest shall be imposed under subsection (a) in respect of any assessable penalty, additional amount, or addition to the tax (other than an addition to tax imposed under section 6651(a)(1), 6659, 6660, or 6661) only if such assessable penalty, additional amount, or addition to the tax is not paid within 10 days from the date of notice and demand therefor, and in such case interest shall be imposed only for the period from the date of the notice and demand to the date of payment.
>
> □ (B) Interest shall be imposed under this section with respect to any addition to tax imposed by section 6651(a)(1), 6659, 6660, or 6661 for the period which

> • (i) begins on the date on which the return of the tax with respect to which such addition to tax is imposed is required to be filed (including any extensions), and
>
> • (ii) ends on the date of payment of such addition to tax.

Pub. L. 98-369, § 158(a), Oct. 22, 1986. The Public Law stated the effective date as follows: "The amendment made by this section shall apply to interest accrued after the date of the enactment of this Act, except with respect to additions to tax for which notice and demand is made before such date." Id. In 1988, 26 U.S.C. § 6601(e) was amended to include the following revision: "Paragraph (2) of section 6601(e) of the 1986 Code is amended by striking out '6659' each place it appears and inserting in lieu thereof '6653, 6659.'" Pub. L. 100-647, § 1015(b)(2)(C), Nov. 10, 1988. Thus, even though the language of section 6653 was altered to exclude mention of interest accruing on income tax fraud penalties, Congress, by the 1988 amendment of section 6601(e), continued to allow interest on section 6653 fraud penalties, and simply shifted mention of section 6653 interest to the applicable provisions of section 6601(e).

The plaintiffs' reliance on IRS Notice 746 and the legislative history of sections 6653 and 6601(e)(2), therefore, is flawed. Although plaintiffs apparently cling to their unfounded assumption that IRS Notice 746 could abrogate a section of the

United States Code,32 plaintiffs also fail to consider that language allocating interest to fraud penalties was added to section 6653 in 1982, and this language was not revised (to eliminate mention of interest) until 1989. Further, in 1988, Congress revised the language of section 6601(e)(2)(B) to include specific mention of interest to be added to "any addition to tax imposed by section 6651(a)(1) or 6653," to be calculated beginning on the date that the tax return was due, and ceasing upon full payment of all tax liabilities. See 26 U.S.C. § 6601(e)(2)(B)(i)-(ii) (as amended, Pub. L. 100-647, § 1015(b)(2)(C), Nov. 10, 1988).

Plaintiffs' two arguments: "that interest was added to fraud penalties . . . for taxes due on 9-3-1982," and that "Larson's tax returns for tax years 78-80 were due on 4-15-1981, so they pre-dated the fraud penalty interest," also are ineffective. Initially, when plaintiffs filed their 1978, 1979 and 1980 tax returns, these tax returns contained fraudulent information. Mr. Larson "was not shown as having a profession, job, or income earning position or activity

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32 As recently as August 21, 2008, the IRS sent a "Statutory Notice of Claim Disallowance" to the plaintiffs that contained the following language:

> We are sorry, but we cannot allow the entire claim for the following reasons:
>
> Your request for abatement of interest charged on the IRC 6653(b) Fraud Penalty cannot be approved as a matter of law. For the years at issue, interest applies to the Fraud Penalty, as computed from the penalty assessment date, pursuant to IRC Section 6601; see 6601(e)(2), formerly 6601(e)(3) and (4).

other than farming," yet there was evidence of "large numbers of untraceable cash transactions...,evidence of numerous asset acquisitions..., and [plaintiffs'] lavish lifestyle and relatively small amount of reported income on their returns." Larson v. Comm'r, 1994 WL 285892, at *3. In his August 19, 1985 criminal plea agreement, plaintiff Duane Larson conceded the accuracy of the criminal tax computations for the 1978, 1979 and 1980 tax years and agreed "to cooperate fully with the IRS in settling his civil taxes as assessed . . . ." United States v. Duane Wendall Larson, Crim. No. 3-85-43, plea agreement at 2, ¶ 10 (D. Minn. Aug. 19, 1985). The government also preserved the right to take "civil action necessary to settle the [plaintiff's] tax liabilities for 1978, 1979 and 1980." Id. at 3, ¶ 13. Once the 1985 criminal tax computation was established, Mr. Larson was liable to pay the assessed amount. Finally, the August 19, 1985 criminal tax computations served as the basis to compute section 6653 fraud penalties, including interest added to the fraud penalties.

This court does not have subject matter jurisdiction over plaintiff Duane Larson's claim against the Social Security Administration.

Finally, regarding his 1978, 1979 and 1980 tax years, in Count IX of the complaint in case no. 08-737T, plaintiff Duane Larson argues that he is owed a refund of his self employment, social security benefits for tax years 1978-1980 because the IRS failed to transmit the self-employment information to the Social Security Administration ["SSA"]. Plaintiff asserts that the "IRS did not transmit the self-employment information to the SSA within the statute of limitations period," and thus "the self-employment credits could not be increased in Larson's account." In the first place, the court is unaware of any duty on the part of the IRS to transmit such information. Second, in terms of jurisdiction, the United States Court of Appeals for the Federal Circuit has stated:

> Construing appellant's pleading in a light most favorable to him, that is, as a claim for social security disability benefits, we hold that the Claims Court has no jurisdiction under the Tucker Act . . . over claims to social security benefits, even considering appellant's assertions that he is entitled to relief under the Constitution. See Weinberger v. Salfi, 422 U.S. 749, 756-767 (1975) (42 U.S.C. §§ 405(g) and (h) (1982) require that action for social security benefits must be brought in district court) . .

Marcus v. United States, 909 F.2d 1470, 1471 (Fed. Cir. 1990). Moreover, this court cannot provide the requested relief necessary to rectify a negligent action of a federal agency, as noted above.

This court does not have subject matter jurisdiction over plaintiffs' tax year 1986 refund claim

In a confused and internally inconsistent assertion of facts, Count VII of plaintiffs' second amended complaint in case no. 08-737T claims that they are owed a refund of $16,825.45 from the IRS, together with statutory interest. Plaintiffs allege:

> Larson filed his tax return for 1986 in 1987. Larson paid the tax for his 1986

> tax return in 1987. However, the IRS mistakenly, temporarily, put $16,825.45 into tax year 1986 during 1990. This money consisted of $10,825.45 from the $50,000 cashier's check that [IRS agent] Dave Gunderson collected on 8-13-90 and Larson's personal check . . . in the amount of $6,000 dated 5-21-90.

Plaintiffs further assert that the IRS Account Transcripts for 1986 were changed, without notation as to when the money was transferred, and question to what year the money was applied, if at all, or whether "[t]he $16,825.45 appears to have been lost by the IRS."

Although plaintiffs allegedly paid for the 1986 tax liabilities in 1987, in the same paragraph, they also allege that the payment emanated from a cashier's check collected by an IRS agent on a specific date, "8-13-90," not 1987, and a personal check dated "5- 21-90," also well after 1987. Given the readily apparent, factual inconsistencies in plaintiffs' allegations, plaintiffs' claim for the $16,825.45 is dismissed for failure to state a claim pursuant to RCFC 12(b)(6).

At the very beginning of the exhibits submitted with their complaint, plaintiffs proffer the following statement as relevant to the 1986 tax year claim:

> [Plaintiffs] [s]eek[ ] $16,825.45 sitting in 1986. Amendment of informal refund

> requests dated 11-5-91, 1-29-92,[33] 5-28-92. The money was collected in 1990 to be applied to tax years 1978, 1979, & 1980. The IRS "[p]arked the money in 1986" to be moved later, but there is no record that it was ever moved permanently. The same money is also sought by 1040X's for tax years 1978-1980 because Larson did not learn the money was not moved out of 1986 until he got updated Account Transcripts printed and sent to Larson in 2006/2007. The tax return for Larsons' 1986 [tax liabilities] was filed and the taxes [for tax year 1986] were paid in 1987. There were no assessments made for 1986 thereafter. It appears the IRS "lost" the $16,825.45.

(brackets added). Regarding this claim, plaintiffs refer the court to the Form 1040X filed by Duane Larson on December 4, 2006. Plaintiffs' claim that their 1986 tax return was amended by documents submitted on "12-4-06 & 3-14-07." The "12-4-06" document, as gleaned from plaintiffs' disorganized exhibits submitted to the court, appears to be a Form 1040X originally submitted on "12-4-06" on which plaintiff Duane Larson noted "[m]inor additions/corrections added to the 3 page [attached] explanation" on "3-14-07," and without specifying what those "minor additions [and] corrections" might be.

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[33] The court notes that the very poorly assembled and disorganized collection of exhibits submitted by plaintiffs also contains two letters dated January 29, 1992. Only one of these contains refund language, although the second seeks "adjustments" on allegedly overpaid accounts. The second January 29, 1992 letter refers to a November 10, 1991 letter from Duane Larson to the IRS in which the only reference to the 1986 tax year is an allegation that, among many other misapplied payments, $6,000.00 paid on May 23, 1990 should be applied from 1986 to 1990.

Defendant argues that, pursuant to 26 U.S.C. § 6511(a), the plaintiffs' 2006 refund claims are "time-barred," and not germane to the 1991 claims regarding the 1986 tax year, as well as not sufficiently "detailed" or precise to identify the legal or factual basis for the claim. Plaintiffs filed their 1986 tax return on October 5, 1987, made two payments, one on August 13, 1990 for $50,000.00 (from which Mr. Larson claims $10,825.45 should have been applied to his 1986 tax year), and a personal check for $6,000.00 on May 21, 1990.
The plaintiffs' attempted reassertion of these 1986 tax claims filed with the IRS in 1991 and 1992 by claims filed with the IRS in 2006, to which "minor corrections" were allegedly made in 2007, as the jurisdictional basis for filing a claim in this court on April 1, 2009, does not cure the statute of limitations defect in plaintiffs' filing established by 26 U.S.C. § 6511(a).34 The stream of consciousness narrative

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34 As previously noted, 26 U.S.C. § 6511(a) dictates that the taxpayer must file a refund claim "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid."

Duane Larson attaches to the Form 1040X dated December 4, 2006 does not address why the 1986 tax assessment was incorrect or should be reconsidered. Nor have the plaintiffs explained why the IRS was incorrect when it applied tax payments made by the Larsons to correct their repeated history of late and incorrect filings, to years other than the ones to which the Larsons tried to have them credited.

The Larson's tax history is not one of prompt, timely, or single payment, on a yearly basis. Plaintiffs appear to have designated payments they made towards tax years for which they had yet to file tax returns, even though those years had passed when the allegedly designated payments were sent in. The IRS is authorized to credit overpayments to earlier unpaid tax years. See 26 U.S.C. § 6402. Perhaps this accounts for the confusion on the part of the plaintiffs. The fact that the Larsons obtained the updated transcript only in "2006/2007" does not change the relevant start date for the running of the statute of limitations. Moreover, two of the documents, dated November 5, 1991 and January 29, 1992, referred to by plaintiffs in the December 4, 2006 Form 1040X, do not appear to even reference the 1986 tax year. In the May 28, 1992 letter, the only mention of the 1986 tax year is in the reference line, which states, "Credit Balances for tax years 1986-1992," without further explanation with respect to 1986 in the body of the letter. Similarly, the March 14, 2007 letter, which plaintiff claims was to make minor additions or corrections to the 1040X Form, only makes a request for the $16,825.45 for the tax year 1986, but without sufficient explanation, reasons or documentation, based on a "belief [that] it was over collected." Consequently, these documents do not cure plaintiffs' statute of limitations problem, or bring their claims within this court's jurisdiction on this 1986 claim. Plaintiffs clearly state in their amended complaint that: "Larson paid the tax for his 1986 tax return in 1987." This is more than three years before even the earliest "11-5-91" date on which plaintiffs claim to have amended their 1986 tax return, even though the summary included at the beginning of plaintiffs' exhibits filed with their complaint states, "[t]he money was collected in 1990 to be applied to tax years 1978, 1979, & 1980."

In opposition to plaintiffs' 1986 claim, defendant also argues that the December 4, 2006 Form 1040X was not germane to the claim filed on November 5, 1991. Plaintiffs' Form 1040X was filed in order to indicate that the return was for tax year 1986 on the plaintiffs' grounds that overpayments made with respect to that year were applied to other years and then lost by the IRS. Additionally, the 1991 letter, which plaintiffs sought to amend, pertained to "tax years 1978-80" and sought a refund for the reasons asserted in plaintiffs' 1985 petition, filed with the United States Tax Court for tax years 1978-1980. The January 28, 1992 letter to the IRS, which plaintiffs also cite as a claim, contains only one sentence: "[e]nclosed please find three Forms 1040X for the years 1978-1980." The third letter to the IRS, on which the plaintiffs based their 1986 claim, dated May 28, 1992, states: "[r]e: Credit Balances for tax years 1986-1992," and requests "a refund for the credit balances existing in the above tax years," but makes no mention of any specific sum related to any specific years, and acknowledges that at the time the letter was sent, "I have not filed returns for these years."

As discussed above, "[t]he purpose of requiring the amended claim to be 'germane' to the original administrative claim is to 'prevent surprise and to give adequate notice to the [IRS] of the nature of the claim.'" Parker Hannifin Corp. v. United States, 71 Fed. Cl. At 235 (quoting Western Co. of N. Am. v. United States, 323 F.3d at 1034) (brackets in original). The germaneness doctrine applies:

> where the taxpayer (1) files a formal claim within the limitations period making a specific claim; and (2) after the limitations period but, while the IRS still has jurisdiction over the claim, files a formal amendment raising a new legal theory–not specifically raised in the original claim–that is "germane" to the original claim . . . .

Computervision Corp. v. United States, 445 F.3d at 1370.

Under this standard, the plaintiffs' 2006 Form 1040X claim did not "amend" the 1986 tax year claim, or amend any claims raised in the November 5, 1991, January 29, 1992, or May 28, 1992 letters. Investigating the November 5, 1991, the January 29, 1992 (which includes tax years 1978-1980), or the May 28, 1992 letters (the later of which only mentions 1986 without the amount claimed), would not cause the IRS to focus on the allegedly missing $16,825.45 from tax year 1986.

Defendant's second contention as to why the 2006 Form 1040X does not qualify as an amended claim is that the merits of the November 5, 1991 claim were fully resolved in the United States Tax Court action. As discussed above, a final decision rejecting a claim forecloses any attempt to amend a claim. See Computervision Corp. v. United States, 445 F.3d at 1372; Stelco Holding Co. v. United States, 42 Fed. Cl. 101, 114 ("A refund claim, informal or formal cannot be amended or perfected as a matter of right after it has been denied or rejected and after the period of limitation has expired." (quoting Newport Indus. v. United States, 104 Ct. Cl. 38, 44, 60 F. Supp. 229, 232 (1945))), recons. denied, 42 Fed. Cl. 156 (1998). Consequently, as the 1994 United States Tax Court action fully resolved all of the plaintiffs' 1978-1980 claims, see Larson v. Comm'r, 1984 WL 285892, at *4-13, the plaintiffs' attempted amendments by the November 5, 1991 and January 29, 1992 letters would fail even if the plaintiffs' 2006 Form 1040X claims were germane. The May 28, 1992 letter also fails for the reasons discussed above and below, namely, that the 1994 Tax Court action conclusively resolved the plaintiffs' 1978-1980 claims and the letter itself lacked the necessary specificity to serve as evidence of an informal refund.

The defendant also argues that letters the plaintiffs seek to amend with their December 12, 2006 Form 1040X and March 14, 2007 amendments thereto cannot be considered informal requests for refund. Under the "substantial variance doctrine," the United States Supreme Court has held that, "in some circumstances a taxpayer's claim is not barred by the statute of limitations even though the taxpayer did not timely file the formal detailed claim required by the regulations." Computervision Corp. v. United States, 445 F.3d at 1363 (citing United States v. Kales, 314 U.S. 186, 196-97 (1941)) (other citations omitted). In United States v. Kales, the Supreme Court stated:

> This Court, applying the statute and regulations, has often held that a notice fairly advising the [IRS] Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period.

United States v. Kales, 314 U.S. at 194 (brackets added); see also Computervision Corp. v. United States, 445 F.3d at 1364.

In this court, the "substantial variance doctrine" is composed of four separate doctrines which apply in "four limited situations," id. at 1364: (1) "the informal claim doctrine," id. at 1364-65; (2) "the waiver doctrine," id. at 1365-68; (3) "the general claim doctrine," id. at 1368-69; and (4) the "germaneness doctrine," id. at 1369-1371, also discussed above. In the instant case, defendant argues that the informal claim doctrine does not provide plaintiffs a basis for jurisdiction to consider the informal letters sent to the IRS in 1991 and 1992, as amended by filing later Forms 1040X or the purported amendments thereto in 2006 and 2007, notwithstanding the applicable statute of limitations in 26 U.S.C. § 6511(a). As stated in Computervision, "[u]nder the informal claim doctrine, a timely claim with purely formal defects is permissible if it fairly apprises the IRS of the basis for the claim within the limitations period." Computervision Corp. v. United States, 445 F.3d at 1364. In fact:

> Informal refund claims have long been held valid. But they must have a written component, and should adequately apprise the Internal Revenue Service that a refund is sought and for certain years. It is not enough that the Service have in its possession information from which it might deduce that the taxpayer is entitled to, or might desire, a refund; nor is it sufficient that a claim involving the same ground has been filed for another year or by a different taxpayer. . . . In addition to the writing and some form of request for a refund, the only essential is that there be made available sufficient information as to the tax and the year to enable the Internal Revenue Service to commence, if it wishes, and examination into the claim.

Am. Radiator & Standard Sanitary Corp. v. United States, 162 Ct. Cl. 106, 113-14, 318 F.2d 915, 920 (1963) (citations omitted); see also Kiddie Indus., Inc. v. United States, 40 Fed. Cl. 42, 61 (1997), appeal dismissed, 194 F.3d 1330 (Fed. Cir. 1999) (table).

"The basic underlying principle [of an informal claim] is the necessity to put the [IRS] on notice of what the taxpayer is claiming and that he is in fact making a claim for refund." Kiddie Indus., Inc. v. United States, 40 Fed. Cl. at 61 (quoting Newton v. United States, 143 Ct. Cl. 293, 300, 163 F. Supp. 614 (1958)) (brackets in original); Mobil Corp. v. United States, 67 Fed. Cl. 708, 717 (2005) ("The purpose of an informal claim is to allow the IRS 'to commence, if it wishes, an examination into the claim.'" (quoting Donahue v. United States, 33 Fed. Cl. 600, 609 (1995))). In order to give the IRS actual or constructive notice of a present refund claim, the claimant must satisfy the following requirements:

> (1) it should be clear from the facts and circumstances that the IRS was on actual or constructive notice that the taxpayer was asserting a right to a refund for a specific year;
> (2) the claim should describe the legal and factual basis for the refund; and
> (3) an informal claim must have a written component.

See Mobil Corp. v. United States, 67 Fed. Cl. at 716. In evaluating the sufficiency of a taxpayer's informal claim, "[t]he determination of whether a taxpayer has satisfied the requirements for an informal claim is made on a case-by-case basis and is based on the totality of the facts." Donahue v. United States, 33 Fed. Cl. at 608 (citing Am. Radiator & Standard Sanitary Corp. v. United States, 162 Ct. Cl. at 114, 318 F.2d at 920); Pennoni v. United States, 86 Fed.

Cl. 351, 362 (2009) (quoting Donahue v. United States, 33 Fed. Cl. at 608).

Because neither party contests the fact that the plaintiffs' refund claims for tax year 1986 did not include a written component, the next consideration is whether plaintiffs gave actual or constructive notice of entitlement to a refund. Although the informal claim doctrine allows for constructive notice, it must be sufficient that the "IRS should have known, based on the facts and circumstances, that the [taxpayer] was making a present demand for a refund of [taxes] . . . ." Mobil Corp. v. United States, 67 Fed. Cl. at 716. As noted above:

> It is not enough that the Service have in its possession information from which it might deduce that the taxpayer is entitled to, or might desire, a refund; nor is it sufficient that a claim involving the same ground has been filed for another year or by a different taxpayer.

Am. Radiator & Standard Sanitary Corp. v. United States, 162 Ct. Cl. at 114, 318 F.2d at 920) (citations omitted).

This court and its predecessor court have consistently highlighted the importance of the taxpayer's informal claim alerting the IRS to the basis of the taxpayer's refund claim. See Mobil Corp. v. United States, 67 Fed. Cl. at 717. ("In our view, it must be clear that the taxpayer is making a present demand for refund. . . . [I]f the IRS is left with the understanding that a taxpayer intends to file a claim in the future, this necessarily negates the inference that a claim is then being asserted.") (footnote omitted and emphasis in original); see also Stelco Holding Co. v. United States, 42 Fed. Cl. at 108 ("'Neither the Commissioner nor his agents can be expected to ferret out any possible grounds for relief which a taxpayer might assert.'" (quoting Union Pacific R.R. Co. v. United States, 182 Ct. Cl. at 113, 389 F.2d at 445).

The United States Supreme Court has rejected as insufficient amorphous taxpayer requests for refunds. In United States v. Andrews, the taxpayer in question claimed a specific refund for two deductions, "or any greater sum which might be ascertained to be due." United States v. Andrews, 302 U.S. at 524. The Supreme Court wrote that this catchall phrase "did not call upon the Commissioner to make a complete reaudit of the taxpayer's return." Id. After the statue of limitations to file a claim had expired, the Andrews plaintiff sought to present an unrelated refund claim. Id. at 525. The Court refused to allow this amendment due to the fact that it was not specifically mentioned within the request for refund in the original claim. Id.

The plaintiffs' attempt to amend their earlier-filed claims must meet the same fate as the claim in Andrews, above. Neither the November 5, 1991 letter, the January 29, 1992 letter, nor the May 28, 1992 letter, seeks a refund of the $16,825.45 for tax year 1986 on the grounds that funds had allegedly been lost, or on other specific grounds which would give the IRS sufficient notice of the claim, actual or constructive. The November 5, 1991 letter and the January 29, 1992 letter do not even refer to the 1986 tax year, but only to the 1978-1980 tax years. The May 28, 1992 letter refers only generally to the years

1986-1992, with no specifics, and an admission that plaintiffs' returns for those years had not been filed. Similarly, plaintiffs' second January 29, 1992 letter, which refers to a November 10, 1991 letter, does not address the 1986 tax obligation, but rather only equates a transfer of $16,000.00 paid to the IRS in 1990 from the 1986 to the 1990 tax year. As none of the plaintiffs' letters made a present or specific demand for the $16,825.45, "[a]n investigation of the items designated [in the original refund request] could not have the least relation to that attempted to be opened in the untimely amendment." United States v. Andrews, 302 U.S. at 525. Moreover, the transcript in the record indicates that the $16,825.45 had already been transferred out of the 1986 tax year ($6,000.00 was removed on May 23, 1990 from plaintiffs' 1986 account and $10,825.45 was removed on August 13, 1990 from the plaintiffs' 1986 account). Thus, the plaintiff's claims in this regard were moot when requested.

The plaintiffs' claim did not adequately describe the factual and legal bases for the refund

As indicated above, together with the requirement that the IRS receive adequate notice from the taxpayer, that he or she is requesting a refund, the taxpayer also must make "available sufficient information as to the tax and the year to enable the [IRS] to commence, if it wishes, an examination into the claim." Donahue v. United States, 33 Fed. Cl. at 609 (quoting Am. Radiator & Standard Sanitary Corp. v. United States, 162 Ct. Cl. At 113-14, 318 F.2d at 920) (brackets added); see also Mobil Corp. v. United States, 67 Fed. Cl. at 718 ("In sum, the claim must provide the degree of specificity necessary for the IRS to commence, at that point, an investigation into the claim within the statutory period."). This requirement also is articulated in 26 C.F.R. § 301.6402-2(b)(1) (2009), which states:

> The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

26 C.F.R. § 301.6402-2(b)(1).

As discussed above, none of the plaintiffs' formal and informal claims satisfy the requirement that the taxpayer "set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the [IRS] Commissioner of the exact basis thereof." Id. The plaintiffs' previously filed refund claims are inadequate to support an amendment by the 2006 Form 1040X, even under a liberal informal claim doctrine. It was not until the plaintiffs submitted the 2006 Form 1040X that the IRS could understand that the plaintiffs sought a refund for tax year 1986, as it related to a claim for the refund of $16,825.45. However, the filing of the 2006 Form 1040X clearly falls completely outside of the applicable statute of limitations. Despite the numerous communications and letters by the plaintiffs in their submissions to the IRS, plaintiffs failed to articulate the gravamen of their complaint regarding the 1986 tax year, or offer proof or an adequate description of the basis for that 1986 refund claim.

Plaintiffs' refund claims for tax years 1985-1989, 1991 and 1992 should be dismissed for failure to state a claim

Plaintiffs' amended refund claims for the years 1988, 1989 and 1991 are prohibited by the doctrine of variance

Count VI of the plaintiffs' second amended complaint in case no. 08-737T embodies a refund claim for funds moved from, and interest charges accrued for tax years 1988, 1989 and 1991 in the amount of $22,439.24, plus interest.35 Plaintiffs claim that the IRS improperly transferred amounts from those years to tax years 1978 and 1980, leading to deficiencies and interest penalties for tax years 1988, 1989 and 1991:

> Thereafter, tax years 1988, 1989, and 1991 showed delinquent taxes due and were charged interest and penalties until 10-21-97 when Larsons paid off the entire debt for tax years 1988, 1989, and 1991 as if he had paid nothing at all to tax years 1988, 1989, and 1991 prior to 10-21-1997.

Defendant argues that these claims are not consistent with previously filed claims for

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35 As to plaintiffs' allegation in their complaint of having paid $10,825.45 from a $50,000.00 cashier's check to an IRS official on August 13, 1990, and a personal check in the amount of $6,000.00 on May 5, 1990, the numbers do not add up to the $22,439.24 claimed.

those years, including the original claims submitted over the course of 1992-1994. Based on this comparison, the defendant argues that the plaintiffs' refund claims, included in their complaint for tax years 1988, 1989 and 1991, are "therefore barred by the doctrine of variance."

While the United States, in some specific circumstances, will waive its sovereign immunity and consent to be sued over a taxpayer refund claim, such waiver is governed by specific statutes. In particular, "[a] taxpayer may not sue the United States for the recovery of income taxes unless it has timely filed a refund claim at the Internal Revenue Service in the manner prescribed by regulation." Lockheed Martin Corp. v. United States, 210 F.3d 1366, 1371 (Fed. Cir. 2000). The regulations at 26 C.F.R. § 301.6402-2(a) require that the taxpayer seeking a refund provide materials to substantiate their claim. Id. Accordingly, the Treasury Regulations further provide that:

> No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of the period. The claim must set forth in detail each ground upon which a credit or a refund is claimed and in facts sufficient to apprise the [IRS] Commissioner of the exact basis thereof.

26 C.F.R. § 301.6402-2(b)(1). Read together, these two provisions offer the framework for evaluating

whether the basis for a taxpayer's refund claims presented in court radically vary from those presented in an IRS administrative claim. "Courts have long interpreted § 7422(a) and Treasury Reg. § 301.6402-2(b)(1) as stating a 'substantial variance' rule which bars a taxpayer from presenting claims in a tax refund suit that 'substantially vary' the legal theories and factual bases set forth in the tax refund claim presented to the IRS." Lockheed Martin Corp. v. United States, 210 F.3d at 1371 (citing Cook v. United States, 220 Ct. Cl. 76, 599 F.2d 400, 406 (1979)); see also Western Co. of N. Am. v. United States, 323 F.3d at 1034 ("Under [the substantial variance] doctrine, a taxpayer may not substantially vary either the factual or the legal basis of any claim for refund in court from those presented in its administrative claim before the IRS."); Burlington N., Inc. v. United States, 231 Ct. Cl. at 225, 684 F.2d at 868 (noting that, "[i]t is well established that a refund action cannot be brought in this court unless a claimant has first met certain statutory prerequisites." (citing 26 U.S.C. § 7422(a))); Marandola v. United States, 76 Fed. Cl. 237, 243 (2007), appeal dismissed, 518 F.3d 913 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2008).

In Computervision Corp. v. United States, 445 F.3d 1355, the United States Court of Appeals for the Federal Circuit elaborated on the variance doctrine as follows:

> In this circuit this aggregation of rules [§ 7422(a) and Treas. Reg. § 301.6402-2(b)(1)] has come to be known as the substantial variance doctrine. The doctrine permits consideration of a

> claim for refund despite failure to timely file detailed formal claims with the IRS when a substantial variance from the requirements of the regulation is not involved.

Computervision Corp. v. United States, 445 F.3d at 1363-64 (footnote and citations omitted). As noted above, the Federal Circuit listed only four specific circumstances in which variance would be allowed. The four circumstances themselves have been identified as separate doctrines by the Federal Circuit: (A) the "informal claim doctrine," under which a timely claim with only formal defects is permitted if the IRS has been apprised of the basis for the claim within the limitations period, id. at 1364; (B) the "waiver doctrine," under which, if a "taxpayer files a formal claim, but fails to include the specific claim for relief, the claim may nonetheless be considered timely if the IRS considers that specific claim within the limitations period," id. at 1365; (C) the "general claim doctrine," under which, if a formal claim has been timely filed, and an amendment is filed outside the limitations period that makes the general claim more specific or definite on matters already within the IRS' knowledge, or which in the course of an investigation the IRS would have naturally ascertained as the basis for the claim, and the IRS has not been misled, then the amendment is permissible, id. at 1368; and (D) the "germaneness doctrine," under which: "the taxpayer (1) files a formal claim within the limitations period making a specific claim; and (2) after the limitations period but, while the IRS still has jurisdiction over the claim, files a formal amendment raising a new legal theory-not specifically raised in the original claim-that is 'germane' to the original claim, that is, it depends upon facts that the IRS examined or should have examined within the statutory period while determining the merits of the original claim," id. at 1370. As a matter of policy, the doctrines are applied to a tax refund suit, because they ensure that the taxpayer claim:

> (1) gives the IRS notice as to the nature of the claim and the specific facts upon which it is predicated; (2) gives the IRS an opportunity to correct errors; and (3) limits any subsequent litigation to those grounds that the IRS had an opportunity to consider and is willing to defend.

Lockheed Martin Corp. v. United States, 210 F.3d at 1371 (citing Ottawa Silica Co. v. United States, 699 F.2d 1124, 1138 (Fed. Cir. 1983)); see also Union Pac. R.R. Co. v. United States, 182 Ct. Cl. at 109, 389 F.2d at 442.

The defendant points to letters in the exhibits filed with the court in which the plaintiffs have urged substantially different legal theories and factual bases in their IRS administrative requests, including informal refund letters and Forms 1040X for refund, as compared to those raised in the instant, disorganized complaint, including the descriptions by plaintiffs of alleged conversations with IRS officials submitted by them to rebut evidence in the record, and letters dated (1) May 28, 1992; (2) June 6, 1993; (3) April 24, 1994; (4) September 12, 1994; and (5) March 22, 1999. These letters run the gamut and, apparently, based on their vague nature, plaintiffs hope to preserve all and any refund rights. Some include tax years, some include tax years and alleged amounts, and only one even mentions a justification for refunds, and then only by reference to an earlier letter sent to the IRS without explanation as to what basis the refund was requested. The plaintiffs requested refunds of non-specific "credit balances" resulting from payments made during 1990-1991, but also indicated that no returns had yet been filed by taxpayers for the years 1986-1992. Further, the plaintiffs' March 22, 1999 letter requested refunds of $2,747.81, allegedly due to this amount having been transferred from tax year 1997 to 1991, and $594.24 that allegedly "disappeared" from the plaintiffs' account. Finally, with their Forms 1040X, the plaintiffs filed an apparently loosely related factual statement and a lengthy, legal-type brief entitled "EXPLANATION OF AMENDMENTS TO TIMELY FILED INFORMAL CLAIMS FOR CREDIT FOR TAX YEARS 1988 AND 1989 WHICH EFFECTS [sic] SCHEDULE D OF FORM 1040[X] FOR TAX YEAR 2005." (emphasis in original). In the attempted explanation, plaintiffs claimed that they are:

> now amending [their] timely filed informal claims for capital loss credit for tax years 1988 . . . and 1989 . . . so as to include capital loss for these two properties in tax years 1988 and 1989.
>
> . . . .
>
> Larson asks that the IRS please calculate the changes to tax year 2005

> [from the capital loss amendments] for Larson.

Despite the plaintiffs' assertions, the February 15, 2007 Form 1040X did not include a refund claim consisting of either interest upon their accounts in February 1996 or on their 1988, 1989 and 1991 accounts due to allegedly improper IRS transfers of monies to other tax years. Quite simply, as the plaintiffs failed to administratively advance a claim pertaining to a refund of accrued interest from their 1988, 1989 and 1991 accounts, they may not, at this late date, advance such a claim in their complaint before this court.

Plaintiffs' claim that the IRS cannot transfer credit balances to other tax years is not viable

In Count V of the plaintiffs' complaint in case no. 08-737T, plaintiffs seek a refund of monies allegedly paid toward tax liabilities stemming from the 1985-1989, 1991 and 1992 tax years. Specifically, plaintiffs argue that "[t]he levy and collection made by the IRS of checks designated [by plaintiffs] for tax years 1985-1989, and 1991 and 1992 were collections made by levy (26 U.S.C. 7701(a)(21)), and were made before the Tax Court order was final. To collect against anything, by any means, to be paid against a case that is before the Tax Court before the Tax Court order is final is a violation of 26 USC

6213(a)36 and 26 USC 6512(a)(5)."37 According to the complaint, "Larson demands judgment for the refund of the money collected by the IRS seizing Larson's payments that Larson had paid to be applied to other years, as overpayments, or by any other means, including, but not limited to, IRS

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[36] Section 6213(a) reads, in part:

> Except as otherwise provided in section 6851, 6852 or 6861, no assessment of a deficiency in respect of any tax . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted . . . if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

26 U.S.C. § 6213(a).

[37] Section 6512(a)(5) states:

> If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) . . . and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) (or 7481(c) with respect to a determination of statutory interest -or section 7481(d) solely with respect to a determination of estate tax by the Tax Court), no credit or refund of income tax for the same taxable year, . . . in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except--
>
> As to any amount collected within the period during which the Secretary is prohibited from making the assessment or from collecting by levy or through a proceeding in court under the provisions of section 6213(a).
>
> 26 U.S.C. § 6512(a)(5)

internal record keeping adjustments."

The Internal Revenue Code at section 6331(b) defines the term "levy" to include "the power of distraint and seizure by any means." 26 U.S.C. § 6331(b) (2006); see also Black's Law Dictionary 816 (7th ed. 1999) ("Levy – The legally sanctioned seizure and sale of property; the money obtained from such a sale."); Interfirst Bank Dallas, N.A. v. United States, 769 F.2d 299, 305 (5th Cir. 1985) ("It [section 6331] clearly contemplates that a levy is a forcible means of extracting taxes from a recalcitrant taxpayer.") (footnote omitted), cert. denied, 475 U.S. 1081 (1986). This definition stands in stark contrast to plaintiffs' misuse of the term "levy" in this context and accusations of a forceful and illegal IRS "levy." As the record reflects, and plaintiffs themselves state, the multiple payments (18 personal checks and one cashier's check) designated by them to be applied to tax years 1985-1989, 1991 and 1992, were made by the taxpayers, free of duress, in 1989, 1991 and 1992. The payments were voluntary payments and, therefore, could not fall under any prohibitions for unilateral collection by the government, whether there was ongoing litigation or not. Nonetheless, although misusing the term "levy," the plaintiffs' complaint appears to argue that the failure of the IRS to apply the 19 checks submitted by plaintiffs in the exact categorization and to the exact tax years to which plaintiffs tried to designate the payments constituted an involuntary and improper application of those funds to different tax years than those chosen by plaintiffs. There are several difficulties with the plaintiffs' argument.

The IRS possesses the discretionary authority to apply tax overpayments[38] to previous outstanding tax liabilities pursuant to section 6402(a):

> In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c) and (d), refund any balance to such person.

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[38] In the context of tax law, the United States Supreme Court has noted:

> we read the word "overpayment" in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.

Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947), reh'g denied, 333 U.S. 850 (1948).

26 U.S.C. § 6402(a) (1988); see also 26 C.F.R. § 301.6402-1 ("The Commissioner, within the applicable period of limitations, may credit any overpayment of tax, including interest thereon, against any outstanding liability for any tax (or for any interest, additional amount, addition to the tax, or assessable penalty) owed by the person making the overpayment and the balance, if any, shall be refunded, subject to sections 6402(c) and (d) and the Regulations there under, to that person by the Commissioner.").

Although 26 U.S.C. § 6402(a) and 26 C.F.R. § 301.6402-1 allow the IRS discretion to apply an overpayment by a taxpayer to outstanding tax liabilities of that taxpayer, the IRS first must try to honor the taxpayer's designation if the payment was voluntary on the part of that taxpayer. When a taxpayer makes voluntary payments to the IRS, he has a right to direct the application of payments to whatever type of liability he chooses. If the taxpayer makes a voluntary payment without directing the application of the funds, the IRS may make whatever allocation it chooses. When a payment is involuntary, IRS policy is to allocate the payments as it sees fit. Muntwyler v. United States, 703 F.2d 1030, 1032 (7th Cir. 1983) (citation omitted); see also Sotir v. United States, 978 F.2d 29, 30 (1st Cir. 1992) ("When a taxpayer makes a voluntary payment without indicating the liability to which the payment is to be applied, ordinarily the IRS may apply the payment to whichever liability of the taxpayer it chooses."), cert. denied, 507 U.S. 961 (1993); Davis v. United States, 961 F.2d 867, 878 (9th Cir. 1992) ("When a taxpayer submits a voluntary payment she may designate to which liability the money should be applied. If the taxpayer fails to target the funds to a specific liability, the IRS may apply the payment as it sees fit.") (citations omitted), cert. denied, 506 U.S. 1050 (1993); Wood v. United States, 808 F.2d 411, 416 (5th Cir. 1987) ("It is well established that in the absence of a direction by the taxpayer the IRS can apply a payment to any outstanding tax liability of the taxpayer . . . . But if the taxpayer directs that a payment be applied in a certain manner, the IRS must abide by the taxpayer's direction.") (citations omitted); Bryant v. Comm'r, 97 T.C.M. (CCH) 1384, 2009 WL 981715, at *4 (U.S. Tax Ct. 2009) ("When a taxpayer owing more than one tax or owing tax for more than 1 year makes voluntary payments to the IRS, he or she may, by specific written directions, assign the application of those payments to any portion of the liability. Wood v. United States, 808 F.2d 411, 416 (5th Cir. 1987); O'Dell v. United States, 326 F.2d 451, 456 (10th Cir. 1964). Under the voluntary payment rule, when a taxpayer who has outstanding tax liabilities voluntarily makes a payment, the IRS usually will honor the taxpayer's request as to how to apply that payment. United States v. Ryan, 64 F.3d 1516, 1522 (11th Cir. 1995)."); Rev. Proc. 2002-26, 2002-1 C.B. 746 ("If additional taxes, penalty, and interest for one or more taxable periods have been assessed against a taxpayer (or have been mutually agreed to as to the amount and liability but are unassessed) at the time the taxpayer voluntarily tenders a partial payment that is accepted by the Service and the taxpayer provides specific written directions as to the application of the payment, the Service will apply the payment in accordance with those directions."). The distinction between voluntary and involuntary payments has been succinctly defined by the United States Tax Court:

> An involuntary payment of Federal taxes means any payment received by agents of the United States as a result of distraint or levy or from a legal proceeding in which the Government is seeking to collect its delinquent taxes or file a claim therefor

Amos v. Comm'r, 47 T.C. 65, 69 (1966); see also Muntwyler v. United States, 703 F.2d at 1032 (noting that the Tax Court's involuntary payment definition in Amos v. Comm'r is "frequently cited."). The Muntwyler Court of Appeals further clarified the voluntary and involuntary payment distinction by adding:

> The distinction between a voluntary and involuntary payment in Amos and all the other cases is not made on the basis of the presence of administrative action alone, but rather the presence of court action or administrative action resulting in an actual seizure of property or money as in a levy. No authorities support the proposition that a payment is involuntary whenever an agency takes even the slightest action to collect taxes, such as filing a claim or, as appears to be a logical extension of the Government's position,

> telephoning or writing the taxpayer to inform him of taxes due.

Id. at 1033 (emphasis in original).

However, the application of a voluntary taxpayer overpayment with specific instructions to the IRS as to how it is to be applied must be made toward a current (i.e., "outstanding") liability. See N. States Power Co. v. United States, 73 F.3d 764, 767 (8th Cir.) ("We agree with the United States that the word 'liability' in Section 6402[a] means 'outstanding liability,' one that is unpaid when the credit is made.") (emphasis in original), cert. denied, 519 U.S. 862 (1996). The Larson plaintiffs allege to have designated payments totaling $189,758.00 to be applied to tax years 1985 through 1989.[39] Despite these designations, the plaintiffs' claim that the IRS improperly failed to apply the voluntary payments in accordance with the plaintiffs' designation fails. In fact, at the time of the payments, plaintiffs had yet to file returns for the tax years they designated for application of their payments. Plaintiffs' tax returns for the years 1988, 1989 and 1991 were not filed until September 10, 1994.[40]

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[39] According to plaintiffs' complaint, alleged payments by the taxpayers and IRS credits to the taxpayers' account were made as follows:

- In 1989 and 1990, plaintiffs paid a total of $120,075.00 to the IRS. This amount was paid over the balance of 18 checks, and the plaintiffs claim that each check was "designated to be applied to tax years 1985-1989." The IRS paid $29,900.00 to the Department of Justice to cover Duane Larson's criminal fine stemming from his federal conviction. Thus, according to the plaintiffs, payment of the criminal fine left $90,175.00 to be applied to tax years 1985 to 1989. Further, Duane Larson claims to have paid an additional $12,637.00 toward his 1992 estimated taxes, bringing the total of the two payments to $52,610.00.
- On April 16, 1991, plaintiff Duane Larson paid $46,973.00 to the IRS by cashier's check to be applied to tax year 1991.
- On April 10, 1992, Duane Larson paid the IRS $39,973.00 in estimated taxes for tax year 1992.

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[40] In their complaint, plaintiffs state: "[t]he Tax Returns for tax years 1988, 1989, and 1991 were all three filed on 9-10-1994." (emphasis in original).

Without a valid (or completed) tax return on file with the IRS, tax liability cannot be calculated. See, e.g., United States v. Verkuilen, 690 F.2d 648, 654 (7th Cir. 1982) ("A tax form which does not disclose sufficient information from which tax liability can be calculated is not a tax return under the Internal Revenue Code.") (citations omitted); accord, Edwards v. Comm'r, 680 F.2d 1268, 1269-70 (9th Cir. 1982); Montgomery v. Comm'r, 122 T.C. 1, 7-8 (2004) ("[I]t is reasonable to interpret the term 'underlying tax liability' as a reference to the amounts that the Commissioner assessed for a particular tax period. In this regard, the term 'underlying tax liability' may encompass an amount assessed following the issuance of a notice of deficiency under section 6213(a), an amount 'self-assessed' under section 6201(a),41 or a combination of such amounts."). Nor, at the time plaintiffs submitted the voluntary payments listed above, had the IRS assessed a Notice of Deficiency for tax years 1985-1992. At the

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[41] Section 6201 of the Internal Revenue Code reads in part:

> (a) The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall include the following:
>
> (1) The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title . . . .
>
> 26 U.S.C. § 6201(a)(1) (2006)

time plaintiffs made the payments, the outstanding tax year liabilities for which returns had been filed were tax years 1978 and 1979, precluding the ability of the IRS to apply the plaintiffs' voluntary $189,758.00 in payments to anything other than established tax liability for those years. As a result, the IRS applied the payments to 1978 and 1979. Plaintiffs' allegations that their attempted designations were improperly ignored must fail.

Plaintiffs' second complaint

On July 21, 2009, these same plaintiffs, Duane and Pamela Larson, filed yet another complaint, case no. 09-470T, claiming a tax refund in this court, this time for $17,349.69. In contrast to the $189,758.00 discussed above, the IRS did, in this instance, levy plaintiffs' property, the sale proceeds of which were applied to plaintiffs' tax year liabilities for 1978. Additionally, both monetary amounts ($189,759.00 and $17,349.69) were applied by the IRS to a tax year that was under United States Tax Court jurisdiction. However, in light of this levy and application to outstanding tax liabilities, both the amounts at issue in the earlier complaint, case no. 08-737T, and this new complaint were valid IRS actions under the Internal Revenue Code, executed in order to satisfy plaintiffs' tax liabilities.

Although plaintiffs admit that this most recent complaint "was originally meant to be included within, and is described at various places within, Plaintiffs' Second Amended
Complaint," in case no. 08-737T, plaintiffs, instead,

filed a new, very brief complaint.42 The plaintiffs did file a Notice of Directly Related Case pursuant to RCFC 40.2, and are urging the consolidation of the

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42 Specifically, the plaintiffs cite a administrative error and mistake as the reason for the delay in filing this claim:

> Larson filed his amended refund request for tax year 1978 seeking the $17,349.69 on 10-15-2008 because he had mistakenly forgotten to file the 1978 amended refund request, earlier. Rather, by mistake Larson had filed an amended refund request for tax year 1976 instead. Consequently, he had to file a correct refund request amendment for tax year 1978, which he did on 10-15-08.

Plaintiffs also note that under 26 U.S.C. § 6532(a)(1) (2006), an administrative refund request must be denied, pursuant to 26 U.S.C. § 7422(a), before relief can be pursued in court. However, section 7422(a) also considers the claim "denied," if the IRS does not respond to the claim after six months. Thus, plaintiffs argue that, as of the original case's filing (October 16, 2008), this most recent claim was not administratively "ripe" for adjudication. However as stated in Computervision Corporation:

> The same rule necessarily applies where the taxpayer elects to terminate the IRS's jurisdiction by filing a suit for refund. While the taxpayer has the right to file a refund suit if the IRS has not acted on the claim for six months, the IRS's jurisdiction over the claim necessarily terminates on the date a refund suit is filed. See Exec. Order No. 6166, § 5 (June 10, 1933), reprinted in 5 U.S.C. § 901 (2000). The IRS no longer has the authority to resolve the claim, and therefore is without power to "allow" or "disallow" it.

Computervision Corp. v. United States, 445 F.3d at 1372.

claim in case no. 09-470T with the earlier case no. 08-737T to promote judicial efficiency. According to the plaintiffs, the cases are related because both complaints involve "the same parties and [are] based upon the same or similar claims." Moreover, the pertinent facts of this most recent complaint are interspersed throughout the filings in the earlier case no. 08-737T, including evidence included in the material attached to the plaintiffs' first complaint regarding the $17,349.69 which was claimed to have been applied to the plaintiffs' 1978 account. In a separate order, the court has consolidated the two cases.

The new complaint again raises an allegedly illegal IRS levy and subsequent sale of 256 gold coins, put up as collateral for bond in Duane Larson's criminal case, the proceeds from which were applied to the plaintiffs' outstanding tax liabilities for tax year 1978. Plaintiff Duane Larson pled guilty to criminal tax evasion for the year 1979, but also conceded the accuracy of the criminal tax computations for the years 1978, 1979 and1980. The plaintiffs assert that:

> On 3-10-1986 the IRS presented a Notice of Levy[43] to Goldberg Bonding Co. As a result of that levy 256 gold coins that belonged to Larson were taken from Norwest Midland Bank on 3-18-1986. The IRS sold those coins,

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[43] The copy of the Notice of Levy in the record provided to the court is in part, illegible.

and on 6-2-86 the IRS applied $17,349.6944 to tax year 1978.The plaintiffs contend that they filed three timely, informal refund claims with the IRS on November 5, 1991,45 July 7, 1987, and May 27, 1988. Shortly before filing the original complaint (case no. 08-737T on October 5, 2008) in this court, plaintiffs attempted to amend their previous informal claims for the $17,349.69 with a Form 1040X refund request for tax year 1978. Plaintiffs, relying on the same grounds as in their original filing, claim that "Larson's informal refund requests were filed within 2 years of the payment made on 6-2-86 per 26 USC 6511[a] . . . ." Also, in addition to claiming the validity of their Form 1040X amendments to their refund requests, plaintiffs again argue that this IRS

"levy and collection of $17,349.69 applied to tax year 1978 was a violation of 26 USC 6213(a) because it was done during the time Larson's Tax Court petition was pending and before the U.S. Tax Court order was final" on June 29, 1994. Plaintiffs seek a refund of the $17,349.69 "together with statutory interest thereon from 6-2-86 until the date of its return, per 26 USC 6621."

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44 The IRS actually received $22,560.86 from the sale of plaintiffs' 256 gold coins. However, the IRS applied $5,211.17 of this total to tax year 1976, and the remaining balance (of $17,349.69) was applied to tax year 1978. In the case before this court, plaintiffs do not make any claim for a refund of 1976 tax liabilities, nor was the 1976 tax year involved in the United States Tax Court litigation.

45 The November 5, 1991 informal refund request was for $22,560.86, and was applied to 1976 and 1978 on June 2, 1986.

Initially, plaintiffs filed informal refund requests on July 7, 1987 and May 27, 1988for the entire $22,560.86 from the sale of the gold coins pursuant to 26 U.S.C. § 7422(a). The Larsons argue that these claims were made within "2 years from the time the tax was paid," on June 2, 1986, pursuant to 26 U.S.C. § 6511(a), and the amended return also related back to the informal refund inquiries made by Mr. Larson in 1987 and 1988, as those refund claims for the gold coin sale proceeds had not been approved or denied by the IRS. The Form 1040X amendment, submitted as a refund of $17,349.69, does not mention the coins in the body of the form. Plaintiff Duane Larson, however, appears to have attached a narrative to the Form 1040X filed on October 5, 2008, which mentions a claim for gold coins. The plaintiffs attach only one copy of an informal claim letter to their new complaint in case no. 09-470T, which only mentions a claim for "$22,560.86."46 The bulk of the attachments to the new complaint are copies of IRS responses to such letters, some of which are difficult to read. Reviewing the material in the case no. 09-470T record, there is no mention of, or allusion to, a section 6213(a) illegal levy and collection claim, only a reference to the fact that the United States Tax Court still had jurisdiction over tax year 1978 and a comment as to how the excess from the sale of the gold coins was applied to the 1976 and 1978 tax

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46 The same letter mentioning a refund request of"$22,560.86"for tax year 1986 was filed with case no. 08-737T as an exhibit.

years.

Regardless, levies and collections applied to jeopardy assessments fall within an exception to 26 U.S.C. § 6213(a). Section 6213(a) applies a prohibition to court actions, levies, and collections for tax years when such tax years are under the jurisdiction of the United States Tax Court. In general, the statute states:

> Except as otherwise provided in section 6851, 6852 or 6861, no assessment of a deficiency in respect of any tax . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted ... if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

26 U.S.C. § 6213(a).

In this case, the exception for jeopardy assessments made pursuant to 26 U.S.C. § 6861[47] applies. On August 15, 1985, the IRS made jeopardy assessments of plaintiffs' 1978, 1979 and 1980 taxes, penalties, and interest. Notice and demand for the jeopardy assessments for years 1978, 1979 and 1980 were provided to Mr. Larson by the IRS Notice of Deficiency issued on September 16, 1985. See Fl. Country Clubs, Inc. v. Comm'r, 122 T.C. 73, 86 (2004) ("A 'notice of deficiency' is defined in section 6212(a) as a notice from the Secretary sent to the taxpayer by certified or registered mail in which the Secretary has determined that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, or 44."), aff'd, 404 F.3d 1291 (11th Cir. 2005). Plaintiffs did not pay the proposed deficiency, but instead filed a claim for relief in the United States Tax Court.48

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[47] Jeopardy assessments are authorized under section 6861:

> If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof.

26 U.S.C. § 6861. Section 6213(a)'s exception for jeopardy assessments pursuant to section 6861 is simply stated as, "[e]xcept as otherwise provided in section 6851, 6852 or 6861 . . ." 26 U.S.C. § 6213(a).

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48 The 1994 United States Tax Court opinion does not make any reference to the validity (or invalidity) of the August 1985 jeopardy assessments, but rather only to the validity of the 26 U.S.C. § 6653(b) fraud penalties that were applied to plaintiffs' 1978-1980 accounts on September 16, 1985. However, plaintiffs challenged the collection of jeopardy assessments in the 2004 United States District Court for the Central District of California, case no. 04-1176, and the District Court soundly rejected them:

> Although plaintiffs have pleaded their action as one involving the Service's alleged "excessive" and wrongful collection of their Federal income tax liabilities for the subject years under 26 U.S.C. §§ 6861 and 7433, this action really is nothing more than a refund action for the subject years under 26 U.S.C. § 7422, which involves a repetition of Larson's unsuccessful 1998 District Court Action, albeit utilizing somewhat different theories for recovery. Thus, the action is barred by res judicata.

Duane and Pamela Larson v. Comm'r, No. 04-1176, slip op. at 9 (C.D. Cal. 2005).

In order to collect upon these jeopardy assessments, the IRS is authorized, under section 6331(a), to collect such taxes by means of levy:

> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.
>
> . . . .
>
> If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

26 U.S.C. § 6331(a) (2006). As noted previously, the IRS applied jeopardy assessments to plaintiffs' tax year 1978, 1979 and 1980 liabilities on August 15, 1985. Shortly thereafter, the IRS lawfully served notice of levy upon the bail bondsman in order to take possession of plaintiffs' gold coins, and applied the $17,349.69 from the sale of the coins to the plaintiffs' outstanding 1976 and 1978 tax liabilities.

CONCLUSION

The plaintiffs have filed numerous lawsuits in connection with tax disputes stemming from their tax year liabilities in 1978, 1979, 1980, 1986, 1988, 1989 and 1991, including two lawsuits currently in this court. Plaintiffs have had many opportunities for a full and fair litigation of all their arguments. The plaintiffs' claims have received final judgment from competent courts, and those claims are foreclosed to further litigation in federal courts, notwithstanding the plaintiffs' attempts to repackage those same claims in the instant complaints. Therefore, this court dismisses the plaintiffs' complaints in case nos. 08-737T and 09-470T, both with prejudice, for lack of subject matter jurisdiction, pursuant to RCFC12(b)(1), and for failure to state a claim upon which relief can be granted, pursuant to RCFC 12(b)(6). Costs to the defendant.

IT IS SO ORDERED.

Signed________________

MARIAN BLANK HORN

Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DUANE W. LARSON; et al.,

Nos. 05-55789
05-55892

Plaintiffs – Appellants,

D.C. Nos. CV-04-01176-AHS
CV-98-00902-AHS

UNTIED STATES OF AMERICA; et al.,

MEMORANDUM*

Defendants – Appellees.

Appeal from the United States District Court
for the Central District of California

Alicemarie H. Stotler, District Judge, Presiding

Submitted March 8, 2006**
Filed March 29, 2006

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without argument. See Fed. R. App. P. 34(a)(2).

Duane W. Larson and Pamela A. Larson appeal pro se from the district court's judgments in these related cases dismissing for lack of subject matter jurisdiction their action seeking a declaratory judgment in connection with the Internal Revenue Services's (“IRS”) collection of federal income taxes and penalties assessed for tax years 1978, 1979, and 1980 and denying the Larsons' motion to amend pleadings in a refund action tried in 1999. We affirm.

Duane Larson paid his tax liabilities in full in October, 1997, but did not file the instant refund claim with the IRS until August 9, 2002. Because the Larsons did not file their administrative claim for a tax refund within two years of paying the tax, the administrative claim was untimely under 26 U.S.C. § 6511(a) and 26 C.F.R. § 301.6511(a)-1(a)(2). The district court therefore lacked subject matter jurisdiction over the Larsons' tax refund action. See 26 U.S.C. § 7422(a); *Omohundro v. United States,* F.3d 1065, 1067 (9th Cir.2002); *Imperial Plan, Inc. v. United States,* 95 F.3d 25, 26 (9th Cir.1996) (affirming dismissal for lack of subject matter jurisdiction where taxpayer failed to file timely administrative tax refund claim under section 6511).

We review the denial of a motion to amend the pleadings under Fed.R.Civ.P. 15(b) for abuse of discretion. *Galindo v. Stoody Co.,* 793 F.2d 1502, 1512 (9th Cir.1986). In January, 2005, the Larsons filed a motion to amend the pleadings their 1998 refund action. The district court did not abuse its discretion in denying the Larsons' motion to amend the pleadings, because the issue of overcollection had not been tried by "expesss or implied consent," and Larson admitted that he was not aware of the alleged overcollection until after that action had been concluded. *See* Fed.R.Civ.P. 15(b); *see also Lindauer v. Rodgers,* 91 F.3d 1355, 1357 (9th Cir.1996) ("[O]nce judgment has been entered in a case, a motion to amend the complaint can only be entertained if the judgment is first reopened under motion brought under Rule 49 or 60.").

The Larsons' remaining contentions lack merit. No. 05-55789 **AFFIRMED**; No. 05-55892 **AFFIRMED**.

UNITED STATES OF APPEALS FOR THE FEDERAL CIRUIT

2010-5020

DUANE W. LARSON,

Plaintiff – Appellant,

And

PAMELA A. LARSON,

Plaintiff - Appellant,

v.

UNITED STATES,

Defendant – Appellee.

Appeal from the United States Court of Federal Claims in consolidated case nos. 08-CV-737 and 09-CV-470, Judge Marian Blank Horn.

ORDER

NOTE: This order is nonprecedential.

ORDER

Before Bryson, Circuit Judge, Gajarsa, Circuit Judge, and Moore, Circuit Judge.

A petition for rehearing having been filed by the Appellants, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and same hereby is, DENIED. The mandate of the court will issue on September 22, 2010.

FOR THE COURT

Signed

Jan Horbaly

Clerk

Dated: 09/15/2010

cc: Duane W. Larson; Pamela A. Larson
Rachel Wollitzer

Filed United States Court of Appeals For the Federal Circuit Sep. 15 2010 JAN HORBALY CLERK

LARSON V. US, 2010-5020
(CFC - 08-CV-737;09-CV-470)

FEDERAL STATUTES:

26 USC 6213: Restrictions applicable to deficiencies; petition to Tax Court:

(a) Time for filing petition and restriction on assessment Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

26 USC 6511(a)-(b)(1): Limitations on credit or refund.

(a) Period of limitation on filing claim
Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.
(b) Limitation on allowance of credits and refunds
(1) Filing of claim within prescribed period
No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

26 USC 6512: Limitations in case of petition to Tax Court:

(a)Effect of petition to Tax Court. If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) (or 7481(c) with respect to a determination of statutory interest or section 7481(d) solely with respect to a determination of estate tax by the Tax Court), no credit or refund of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except - (1) As to overpayments determined by a decision of the Tax Court which has become final, and (2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final, and (3) As to any amount collected after the period of limitation upon the making of levy or beginning a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive, and (4) As to overpayments attributable to partnership items, in accordance with subchapter C of chapter 63, and (5) As to any amount collected within the period during which the Secretary is prohibited from making the assessment or from collecting by levy or through a proceeding in court under the provisions of section 6213(a),

26 USC 6861(a)-(f): Jeopardy assessments of income, estate, gift, and certain excise taxes:

(a) Authority for making If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof. (b) Deficiency letters If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary shall mail a notice under such subsection within 60 days after the making of the assessment. (c) Amount assessable before decision of Tax Court The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 6212(c) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court. The Secretary may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount. The Secretary shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of the assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith. (d) Amount assessable after decision of Tax Court If the jeopardy assessment is made after the decision of the Tax Court is rendered, such assessment may be made only in respect of the deficiency determined by the Tax Court in its decision. (e) Expiration of right to assess A jeopardy assessment may not be made after the decision of the Tax Court has become final or after the taxpayer has filed a petition for review of the decision of the Tax Court.

(f) Collection of unpaid amounts When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of which has been stayed by bond as provided in section 6863(b) shall be collected as part of the tax upon notice and demand from the Secretary, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the Secretary.

26 USC 7422(a)-(d): Civil actions for refund.

(a) No suit prior to filing claim for refund No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. (b) Protest or duress Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. (c) Suits against collection officer a bar A suit against any officer or employee of the United States (or former officer or employee) or his personal representative for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected shall be treated as if the United States had been a party to such suit in applying the doctrine of res judicata in all suits in respect of any internal revenue tax, and in all proceedings in the Tax Court and on review of decisions of the Tax Court.

(d) Credit treated as payment The credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability at the time such credit is allowed.

26 USC 7481: Date when Tax Court decision becomes final.

(a) Reviewable decisions Except as provided in subsections (b), (c), and (d), the decision of the Tax Court shall become final - (1) Timely notice of appeal not filed Upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time; or (2) Decision affirmed or appeal dismissed (A) Petition for certiorari not filed on time Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals and no petition for certiorari has been duly filed; or (B) Petition for certiorari denied Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals; or (C) After mandate of Supreme Court Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Tax Court be affirmed or the appeal dismissed. (3) Decision modified or reversed (A) Upon mandate of Supreme Court If the Supreme Court directs that the decision of the Tax Court be modified or reversed, the decision of the Tax Court rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected. (B) Upon mandate of the Court of Appeals If the decision of the Tax Court is modified or reversed by the United States Court of Appeals, and if - (i) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (ii) the petition for certiorari has been denied, or (iii) the decision of the United States Court of Appeals has been affirmed by the Supreme Court, then the decision of the Tax Court rendered in accordance with the mandate of the United States Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected. (4) Rehearing If the Supreme Court orders a rehearing; or if the case is remanded by the United States Court of Appeals to the Tax Court for a rehearing, and if - (A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (B) the petition for certiorari has been denied, or (C) the decision of the United States Court of Appeals has been affirmed by the Supreme Court, then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court has been rendered. (5) Definition of "mandate" As used in this section, the term "mandate", in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate. (b) Nonreviewable decisions The decision of the Tax Court in a proceeding conducted under section 7436(c) or 7463 shall become final upon the expiration of 90 days after the decision is entered. (c) Jurisdiction over interest determinations (1) In general Notwithstanding subsection (a), if, within 1 year after the date the decision of the Tax Court becomes final under subsection (a) in a case to which this subsection applies, the taxpayer files a motion in the Tax Court for a redetermination of the amount of interest involved, then the Tax Court may reopen the case solely to determine whether the taxpayer has made an overpayment of such interest or the Secretary has made an underpayment of such interest and the amount thereof. (2) Cases to which this subsection applies This subsection shall apply where - (A)(i) an assessment has been made by the Secretary under section 6215 which includes interest as imposed by this title, and (ii) the taxpayer has paid the entire amount of the deficiency plus interest claimed by the Secretary, and (B) the Tax Court finds under section 6512(b) that the taxpayer has made an overpayment. (3) Special rules If the Tax Court determines under this subsection that the taxpayer has made an overpayment of interest or that the Secretary has made an underpayment of interest, then that determination shall be treated under section 6512(b)(1) as a determination of an overpayment of tax. An order of the Tax Court redetermining interest, when entered upon the records of the court, shall be reviewable in the same manner as a decision of the Tax Court. (d) Decisions relating to estate tax extended under section 6166 If with respect to a decedent's estate subject to a decision of the Tax Court - (1) the time for payment of an amount of tax imposed by chapter 11 is extended under section 6166, and (2) there is treated as an administrative expense under section 2053 either - (A) any amount of interest which a decedent's estate pays on any portion of the tax imposed by section 2001 on such estate for which the time of payment is extended under section 6166, or (B) interest on any estate, succession, legacy, or inheritance tax imposed by a State on such estate during the period of the extension of time for payment under section 6166, then, upon a motion by the petitioner in such case in which such time for payment of tax has been extended under section 6166, the Tax Court may reopen the case solely to modify the Court's decision to reflect such estate's entitlement to a deduction for such administration expenses under section 2053 and may hold further trial solely with respect to the claim for such deduction if, within the discretion of the Tax Court, such a hearing is deemed necessary. An order of the Tax Court disposing of a motion under this subsection shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

28 USC 1254: Courts of appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 USC 1295(a)(3): Jurisdiction of the United States Court of Appeals for the Federal Circuit.

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction -
(3) of an appeal from a final decision of the United States Court of Federal Claims;

28 USC 1346: United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

Internal Revenue Service
Department of the Treasury

District Director
209 S. 2nd St., Suite 409
Mankato, MN 56001

Mr. Duane W. Larson
Box 1000-I
Sandstone, MN 55072

Person to Contact: David N. Gunderson
Telephone Number (507) 388-6027

Refer to: C:F:13
Date: July 23, 1990
RE: 485-56-8443

Dear Mr. Larson:

Per our conversation of July 20, 1990, I am pleased to provide the information you requested.

As I reviewed the balance due the INTERNAL REVENUE SERVICE, I noted that the balance you were provided last week did not include the Failure to Pay Penalty (0.05% per month, to a maximum of 25%).

For the specific years showing outstanding balances, the August 6, 1990 balance due is as follows:

1978	$48,094.09	Assessed Total
	9,030.27	Accrued Failure to Pay
	76,090.96	Accrued Interest

	$133,215.32	Total

1979	$96,026.75	Assessed Total
	9,953,05	Accrued Failure to Pay
	65,133.59	Accrued Interest

	$171,118.39	Total
1980	$272,934.38	Assessed Total
	30,107.63	Accrued Failure to Pay
	183,724.28	Accrued Interest

	$486,766.29	

Grand Total $791,100.00.

The daily interest on this liability to the INTERNAL REVENUE SERVICE is $223.62.

LARSON, DUANE W.
485-56-8443

I also checked on the issue of the most expeditious method of routing the funds to the INTERNAL REVENUE SERVICE in Mankato. First Bank – Mankato advised me that money can be wired to their office payable to the INTERNAL REVENUE SERVICE. The charge for this service is $8.00, which they deduct from the proceeds.

The bank routing number for First Ban – Mankato is 091900339. The funds should be wired payable to the INTERNAL REVENUE SERVICE. The transfer procedure also provides for a second line in which an annotation such as Attn: D. Gunderson Tel. (507) 3886027 can be added.

You account will be credited effective the day we receive the funds in Mankato. The release of Notices of Federal Tax Lien will take approximately seven to ten days.

Please feel free to contact me if you have any questions.

Sincerely Yours,

Signed
David N. Gunderson
REVENUE OFFICER

Internal Revenue Service
Department of the Treasury

District Director
209 S. 2nd St., Suite 409
Mankato, MN 56001

Mr. Duane W. Larson
FCI
Box 1000-I
Sandstone, MN 55072

Person to Contact: D. Gunderson
Telephone Number (507) 388-6027

Refer to: C:F:13
Date: September 13, 1990

Dear Mr. Larson:

Per our conversation of this date, I am enclosing a copy of the check we received on September 12, 1990 for $199,593.62.

Based on your previous correspondence relating to the application of payments received by IRS, it appears to me that all assessed liabilities have been paid. Accordingly, I am requesting the release of all outstanding Notices of Federal Tax Lien. These releases will be prepared by our Special Procedures Function in St. Paul and will be filed directly in the county recorder's offices.

As I have been advised by office in St. Paul that our service center should be able to effectuate the transfer of money to the Department of Justice for your fine, I anticipate requesting this when you have indicated to me the specific payment which should achieve this goal.

Sincerely yours,

Signed
David N. Gunderson
Revenue Officer

Attachment

Internal Revenue Service
Department of the Treasury

District
Director

209 S. 2nd St., Suite 409
Mankato, MN 56001

Mr. Duane W. Larson
FCI
Box 1000 Unit I
Sandstone, MN 55072

Person to Contact: D. Gunderson
Telephone Number (507) 388-6027

Refer to: C:F:13
Date: September 24, 1990

Dear Mr. Larson:

Based on your recent payments, and your previous correspondence relating to the application of payments received by IRS, it appears to me that all assessed liabilities have been paid. Accordingly, I have requested the release of all outstanding Notices of Federal Tax Lien. These releases will be prepared by our Special Procedures Function in St. Paul and will be filed directly in the county recorder's offices.

As I have been advised by office in St. Paul that our service center should be able to effectuate the transfer of money to the Department of Justice for your fine, I anticipate requesting that I will be able to request this in the near future.

Sincerely yours,

Signed
David N. Gunderson
Revenue Officer

Internal Revenue Service
Department of the Treasury

District Director
209 S. 2nd St., Suite 409
Mankato, MN 56001

Mr. Duane W. Larson
01786-041
Box 1000H
Sandstone, MN 55072

Person to Contact: D. Gunderson
Telephone Number (507) 388-6027

Refer to: C:F:13
Date: April 16, 1991

Dear Mr. Larson:

We today received a wire transfer of $46,973.00 thru First Bank – Mankato. I applied these funds to 1991 U.S. Individual Income taxes. Please advise me if you wish this money applied differently. I enclose a photocopy of the cashier's check.

I have been unsuccessful in my efforts, to date, to have the Kansas City Service Center pay your fine with the United States Department of Justice. While I think it could be ultimately accomplished, per your letter of February 26, 1991, I have cancelled our efforts to do so.

Sincerely yours,

Signe

David N. Gunderson
Revenue Officer

Duane W. Larson
3640 Independence Ave. So.
St. Louis Park, MN 55426

November 5, 1991

Internal Revenue Service
Refund Department
Andover, Mass. 05501

Re: Refund for years 1978-1980 / U.S. Tax Court Case # 85-44303 – 26 U.S.C. 6511/26 U.S.C. 6402

Sir:

We hereby apply in a timely manner for a total refund of all payments made to the IRS during 1990 which were applied to our tax years 1978-1980. These payments were approximately $809,573.62 and were in total payment of the jeopardy assessment served on us in August 1985, [sic September 1985] plus all interest and penalties. This figure may in the final analysis be as high as $866,102.62 due to applications to other years. We have previously requested refund of the $22,560.86 applied to 1976 and 1978 on June 20, 1986 and we also renew that request here.

The reason this refund is requested is because the assessment was served outside the statute of limitations for the years 1978-1980, as well as for the other reasons presented in our petition for redetermination of the notice of deficiency as filed in the U.S. Tax Court Case #85-44303 during December 1985. Further, we were given incorrect advice in 1975 or 1976 by the IRS telephone information line. This misadvice caused us to be incorrectly charged with fraud penalties per 26 U.S.C. 6653(b) for the years 1978-1980. We now seek refund of these penalties and interest per the retroactive application (see Chevron Oil Co. v. Huson, 404 U.S. 97 9para 14) of the "Cancellation of Penalties" Clause of the 1988 Taxpayer's Bill of Rights (IRS Pub. No.1 (6-89)).

This letter may be considered as a refund claim. See Radin v. United States, 702 F. Supp. 38, 40-412 (D.C. D. Conn., 1988).

This refund request is made under penalty of perjury.

Signed

____

Duane W. Larson

B.A.; M.B.A.

SS# 485-56-8443

Signed

Pamela A. Larson

B.S.R.N.

SS# 475-56-0347

CC: U.S. Tax Court
400 Second Street N.W.
Washington D.C. 20217

UNITED STATES TAX COURT
Washington, D.C. 20217

DUANE W. LARSON AND
PAMELA A. LARSON,

Petitioners

v.

Docket No. 44303-85

COMMISSIONER OF INTERNAL REVENUE

Respondent

DECISION

Pursuant to the determination of this Court as set forth it its Memorandum Findings of Fact and Opinion (T.C. Memo. 1994-302), filed on June 29, 1994, it is

ORDERED and DECIDED that there are deficiencies in petitioners' Federal income tax and additions to tax as follows:

Year	Deficiency	Fraud Addition to Tax Under Sec. 6653(b)
1978	$36,100.93	$18,050.47
1979	160,694.87	80,347.44

1980	127,094.08	63,547.04

[Grand total taxes and fraud penalties = $485,834.83].

(Signed) Joel Gerber

Joel Gerber Judge

Entered: June 30,1994

Duane W. Larson
Pamela A. Larson
SSN 485-56-8443
Tax Years: 1978, 1979, 1980

APPLICATION OF PAYMENTS - 1978

Payment Application Date	Transaction Code	Payments
06/02/86	670	(17,349.69)
10/16/89	670	(800)
11/22/89	670	(750)
12/07/89	670	(775)
01/02/90	670	(700)
01/18/90	670	(600)
03/05/90	670	(750)
03/12/90	670	(20,000)
05/04/90	670	(8,000)
05/11/90	670	(8,000)
08/23/90	670	(849.18)
09/12/90	670	(3,072.51)
09/12/90	670	(137,198.75)
09/12/90	670	(9,370.32)
Totals		(208,215.46)

Duane W. Larson
Pamela A. Larson
SSN 485-56-8443
Tax Years: 1978, 1979, 1980

APPLICATION OF PAYMENTS - 1979

Payment Application Date	Transaction Code	Payments
02/26/90	670	(800.00)
04/18/90	670	(21,000.00)
05/02/90	670	(3,000.00)
05/31/90	670	(8,000.00)
06/07/90	670	(3,000.00)
06/11/90	670	(8,000.00)
08/09/90	670	(36,000.00)
08/09/90	670	(32,825.45)
08/09/90	670	(36,000.00)
08/13/90	670	(36,000.00)
08/13/90	670	(3,174.55)
08/23/90	670	(120,019.30)
08/23/90	670	(7,006.23)
09/12/90	670	(39,998.98)
09/12/90	690	(9,953.05)
04/16/91	670	(46,973.00)
09/13/94	706	(52,610.00)
11/23/94	736	(65.69)
11/23/94	736	(181.39)
11/23/94	706	(11,926.72)
11/23/94	706	(692.00)
11/23/94	706	(21,396.66)
11/23/94	736	(12,380.84)
11/23/94	706	(9,370.72)

11/23/94	706	(3,072.51)
04/15/95	706	(19,171.00)
04/15/96	706	(15,210.00)
12/02/96	736	(3.24)
04/15/97	706	(14,036.00)
06/26/97	670	(5,000.00)
09/15/97	670	(3,822.88)
09/25/97	670	(25,000.00)
10/02/97	670	(3,404.62)
10/07/97	670	(3,000.00)
10/21/97	670	(106,271.68)
Totals		(718,367.11)

Duane W. Larson
Pamela A. Larson
SSN 485-56-8443
Tax Years: 1978, 1979, 1980

APPLICATION OF PAYMENTS - 1980

Payment Application Date	Transaction Code	Payments
08/23/90	670	(451,998.66)
08/23/90	670	(30,107.63)
Totals		(482,106.29)